No. 8843

# United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY, a Corporation,
*Appellant,*

vs.

HARRY J. GRAY,
*Appellee.*

## BRIEF FOR APPELLANT

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## TREATISES

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## BRIEF FOR APPELLANT

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### STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

The District Court had jurisdiction by reason of diversity of citizenship under Title 28, *United States Code,* Section 41, subdivision 1. The action was instituted by Gray, a citizen of California, against Swift and Company, a corporation and citizen of Illinois, in the Superior Court of the State of California, in and for the County of Sacramento, seeking $52,000 damages (Complaint, R. 1-4)*. Defendant duly filed its petition for removal

*The record is referred to throughout this brief by the designation "R".

(R. 5-8), its undertaking on removal (R. 8-10), notice of petition for removal (R. 10), the cause was thereupon docketed in the United States District Court for the Northern District of California, Northern Division, and issue was there joined (Answer, R. 11-17). From a final judgment (R. 18), this appeal has been taken. This Court has jurisdiction of the appeal under Title 28, *United States Code,* Section 225, subdivision (a), part first, and subdivision (d).

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## STATEMENT OF THE CASE.

### A. THE ACTION

This is an appeal by the defendant Swift and Company from a judgment against it in an action for slander. Defendant is a corporation, hereafter referred to as Swift; the plaintiff Gray was one of Swift's employees at the time of the alleged utterances; and the action is predicated upon remarks supposedly uttered to customers of Swift by two friends of Gray, both employees of Swift, but neither an officer of the corporation, Eugene Harbinson and Charles P. Gould.

The complaint alleges that defendant spoke of plaintiff (R. 2):

> "Harry is short in his accounts with the company. He has been taking the company's money. He has collected money of the company and has not turned it in."

The complaint charges by way of innuendo that the supposed utterances meant and were understood to mean that plaintiff had been guilty of embezzling funds entrusted to him as an employee of the defendant (R. 2, 3).

The answer denies that defendant had made any such utterances (R. 12). By an affirmative defense it alleged that the words, if spoken, were true, while at the same time denying

that they meant or could be understood to mean that plaintiff had been guilty of embezzlement (R. 13-14).

By a further affirmative defense (R. 14-15) it was alleged that if the words were spoken at all, they were uttered without malice on a privileged occasion.

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### B. APPELLANT'S GROUNDS FOR REVERSAL.

A jury having rendered its verdict for the plaintiff, the grounds to which appellant now confines itself in seeking a reversal may be classified in four groups.

**1. The words were spoken on a privileged occasion.**

This contention was raised by motion for non-suit, by motion for a directed verdict, by motion for judgment notwithstanding the verdict, by requests for instructions which were refused, and by objections to instructions which were given. The trial court not only refused to hold that the utterances were made on a privileged occasion, but it refused to submit the issue of privilege as well as the allied issue of malice to the jury, and it held as a matter of law that there was no privilege.

This is now the ground principally assigned by appellant for reversal.

**2. The employees who uttered the words were not acting in the course or scope of their employment, and the corporation is not responsible for anything they may have said.**

This point was raised by motion for a directed verdict, by motion for judgment notwithstanding the verdict, by objections to evidence, and by requests for instructions which were refused.

It is now appellant's second principal ground.

**3. The words proven to have been uttered by Harbinson and those supposedly uttered by Gould are not as a matter of law defamatory, and they are likewise true.**

This contention was raised by requests for instructions which were refused.

**4. Evidence was erroneously admitted concerning efforts of the plaintiff to find employment.**

This point was raised by objections to the evidence. Because of lack of space, we place our discussion of it in the Appendix, pages 15 to 24.

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### C. STATEMENT OF THE FACTS.

Harry J. Gray, the plaintiff, became an employee of Swift in January, 1933, serving in various manual labor jobs in its South San Francisco plant until October, 1933 (R. 74). He then became a sausage service truck driver for Swift on a route from South San Francisco to Palo Alto and continued as such until October 29, 1934 (R. 75). His duties as truck driver were to call on the trade and sell produce right from the truck. Swift had a checking system whereby it kept track of every pound of goods placed on the truck each morning, and everything had to be accounted for (R. 75, 111). The truck driver was given a pad of sales slips known as a sales invoice book. These slips were numbered and the company kept a record of all slips given to a driver. When a sale was made by the driver, the slip was filled out in triplicate, showing the customer's name, address, the materials sold and the amount of the purchase. If the sale was for cash paid to the driver, he marked the slip as paid. The original was given to the customer, and two copies were to be turned into the company. In the case of charge sales, the slips were to be turned in by the driver to the department having supervision of charge accounts. Cash sale slips were to be turned in together with the cash collected to the cashier's

department, together with a tabulation in a cash collection book. The latter was a pad of slips supplied to the driver; at the end of each day the driver was to fill out one slip in triplicate for each town served, showing the customer's name, dates, articles bought and amounts collected.

With respect to cash sales there was thus to be turned in by the driver to the cashier's department three things: (a) the cash; (b) two copies of the sales slips; (c) the cash collection book (R. 75). When these things reached the cashier two copies of the collection sheets were removed from the book, a receipt was marked on the third copy which was left in the book, and the book was returned to the driver. This constituted the driver's receipt for money collected and turned in (R. 75, 128).

By means of a check list entitled "Daily Sales Ticket Report" and commonly called a "checkerboard", the auditor's department was enabled to follow every sales slip outstanding, checking it off on the checkerboard as it was turned in by the driver, in this manner keeping track of accounts with the driver and with the customers (R. 110, 162). As stated by the plaintiff Gray, "The sales tags were checked out to me and in effect charged to me and then credited to me when they came back." (R. 111). "I had to account for each ticket." (R. 131).

A driver was discharged of responsibility only when he had turned in the collected moneys and slips to the person designated to receive them (R. 166).

It is conceded to have been the company's rule, which Gray admitted he knew, that the drivers were to turn in their cash, sales slips, and collection books at the end of each day's work,— to the cashier, if there; if the cashier had left for the day, then to a night order clerk; and if he had left, then to the night watchman (R. 124, 158-161). For several months Gray obeyed the rule, but during the last seven months of his employment he chose to ignore it. He then kept each day's collections overnight in his own room and next morning placed the money,

sales tags and book in an envelope and tossed it into the cashier's cage in the company's office (R. 76, 124) before anyone else had arrived for the day's work. Later in the day the cashier would find the bundle on the floor, and perhaps two or three days later Gray would pick up his receipted collection book. There is conflict in the evidence as to why he deviated from the rule. The explanation given by him in October, 1934, was that he would arrive late in the evening and felt too tired to complete his reports (e.g., R. 164). His version during the trial was that he would get back to the plant each night after the cashier had gone, that the night order clerk would not give him a receipt and that he therefore preferred to retain his collections until the next morning (R. 76). This explanation is at least puzzling, because when he did in fact turn in the money in the mornings, he would throw it in the cashier's cage with no one around and would not obtain his receipt until a subsequent day (R. 125, 128).

In this setting there occurred the happenings of October, 1934, with which this case is concerned.

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On Saturday, October 13, 1934, Gray was about to go on a two weeks' vacation which had already been arranged (R. 76). For the past few days he had been accompanied on his route by Eugene Harbinson, his roommate, who had been assigned to be his relief man during his vacation and in this manner was becoming familiar with the work (R. 77, 85). Gray claims that on Saturday morning about 7:15 A. M., with nobody else around (R. 122), he threw into the cashier's cage a bundle containing about $60 together with the sales slips and collection book covering the previous day's collections (R. 76).

*None of this money or the slips or book has ever been found* (R. 111).

At about 1:30 P. M. on that Saturday, he and Harbinson returned to the plant at the close of the day's work to turn in Saturday's collection. As they were leaving, the cashier Hamilton stopped Gray and asked him where Friday's collections were, stating they had not been received (R. 78). This was all the cashier said (R. 86). Gray and Harbinson thereupon searched the office for the supposed envelope (R. 78, 86). They then returned to their room in the hotel where they were joined by Charles Philip Gould, another employee of the company and former roommate of Gray (R. 86, 148), and the three of them ransacked the hotel room. They then returned to the office and searched again, still without success.

Gray nevertheless desired to proceed upon his vacation, and this he did, that very day, returning on October 28, 1934 (R. 80). Before leaving on his vacation and while still in the plant that Saturday afternoon, the following occurred:

According to the testimony of the plaintiff and of Harbinson, who was his witness, the Assistant Sales Manager Mr. Everett happened to be present in the plant, and Gray told Mr. Everett that he knew approximately how much money had been collected and *volunteered that he would make out a list of this amount,* setting forth the names of the customers and the amount supposedly collected, and that he would leave it with Mr. Everett; that he, Gray had enough money coming to him to cover the *"shortage";* that he had been planning on his vacation and wanted to go although the shortage had not been cleared up (R. 79).

Gray then prepared a list setting forth the customers' names and the amounts collected on Friday, and this, he testified, he gave to Mr. Everett (R. 80). The list is in evidence as Defendant's Exhibit C (R. 122). In Gray's own words:

> "That Saturday afternoon, October 13, after ransacking the baskets and finding no trace of any tickets or anything, Mr. Everett said, 'Mr. Gray, what do you propose to do about this?' I said 'Irving, it looks like a case where the

> money is gone. There is nothing that I can possibly do. I will give you a list of all people that I collected from yesterday. I can give you the approximate amount of the money that I collected from each one. Mr. Harbinson was with me, and he will remember, and that will be a double check. *I will give you this list, and let you check it, and find out how much it is.* I have a check coming for a week's salary and the week you have given me for a vacation. That is enough to cover this amount,' which I thought was around $60.00. *'I realize the money is gone; that I haven't a receipt to show you for it; but naturally I have to make it good,* and as long as I have that much money here you don't have to worry about me, and I am not running away; in fact, I am coming back, and I would like to get to the bottom of it.' " (R. 123, 124)

He also said:

> "I just *volunteered* to give the list to Everett." (R. 124)
>
> *"I drew up that list with the intention that someone should check the route."* (R. 123)

*Thus Gray volunteered to draw up this list and did it with the intention and for the purpose that someone should check the route to determine the facts and the amount and nature of the shortage.*

The plaintiff's friend and witness, Harbinson, described the occurrence thus:

> "At that discussion *Mr. Gray* asked Mr. Everett if he could go on his vacation, *saying there was enough money coming to him to take care of the shortage* and that he would make up the *shortage. That was Mr. Gray's expression at the time.* At that meeting in the office there, Mr. Gray wrote out that list in his own handwriting. *He told Mr. Everett that he could take this list he had prepared in order to check with the amount that was short.* In other words, he told Mr. Everett that he was willing to make up *the shortage* and that he had prepared this list of customers

he had called on so that a check could be made on the amount of the shortage." (R. 95)

The expression "shortage" was thus, according to plaintiff's own witness, the plaintiff's own expression and was first used by plaintiff himself. Plaintiff realized automatically that whatever may have been the reason for the disappearance of the money, the facts that it had not been received by the proper authorities and that he, Gray, had no receipt to show that it had been delivered, sufficed to constitute a shortage (R. 87).

Harbinson testified that on the following Monday, October 15th, Mr. Everett gave the list to him, and told him to check the route (R. 87).

It is well to note at this point that Mr. Everett testified that he never saw or heard of this list, that it was not given to him by Gray, that he had no conversation with Gray on the subject, that he had never requested Harbinson to check the route and never had anything to do with the matter (R. 141, 142). Also, Mr. Gould, who was present that Saturday afternoon, testified that Mr. Gray drew up the list and gave it directly to Mr. Harbinson, asking Mr. Harbinson to take it and check the route for Gray, so that on the latter's return from his vacation he could reimburse the company (R. 149).

There is in the record evidence that at a time previous to the trial Mr. Harbinson had himself admitted the facts as so testified by Mr. Gould (Def. Ex. A, R. 136; Testimony of Hogan, R. 135; of Gould, R. 152), and this is confirmed by the fact that Mr. Gould on the following Monday made an independent check of the route at the request of Mr. Hartl, the plant auditor, as we shall point out. But in view of the jury's verdict we may now accept the plaintiff's version and we shall proceed further on that basis.

On Monday morning, October 15, 1934, Mr. Harbinson began to check the route as he made his round of calls selling sausages for the company. As he called on customers named in

Gray's list (Def. Ex. C), he asked each one for permission to see the sales tickets which Gray had given on Friday, for the purpose of finding out how much money had been collected, i.e., to ascertain the state of the accounts with the customers.

*On no occasion did Mr. Harbinson volunteer information why he wanted to see the tags.* Some customers objected to showing the tags unless they knew why they were wanted; it appeared that Gray had been selling the products at cut rates and the customers felt that this was an attempt to check up on that circumstance. Solely in response to inquiries of customers why the slips were desired, Harbinson told several of them that Gray was short in his accounts. These statements form the basis of the present slander suit.

Mr. Harbinson's testimony was:

> "*I never volunteered anything about the reason why I was there asking unless they objected or asked why I was requiring the sales tag. It was only in response to their questions as to why I wanted the sales tag that I referred to the shortage.* I don't believe anyone on whom I called gave me sales tags without raising any objection about why I wanted it.
>
> "I have mentioned all the people to whom I spoke on Monday as far as I can remember. *When they asked me why I wanted the sales tag, I told them that Mr. Gray had this shortage in the accounts.*" (R. 96).

Harbinson described conversations which he had with eight customers. In order to enable the case to be clearly presented hereafter and to do so frankly, we set out the conversations fully.

At the Los Angeles Market at Burlingame the following conversation occurred:

> "I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. *After some discussion as to why she wouldn't let me see it,* I told her that Mr. Gray was short in his accounts with the company; that I wanted to find out how much she had paid Mr. Gray on

Friday. There was no further conversation with her other than arguing with her over the fact that she thought I was trying to compare prices. There was no further conversation with respect to what I told her I was there for. She gave me the tag." (R. 88)

At Al & Monte's Market in San Mateo the following conversation occurred:

"I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said that he did not have it with him, *and he wanted to know why,* and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid." (R. 89)

At Larry's Groceteria near San Mateo the following is said to have occurred:

"I said that I wanted to see the sales tag Mr. Gray had given him on Friday. *There was some discussion as to why I wanted to see it,* and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money." (R. 90)

At the Economy Market at Menlo Park:

"I wanted to see his sales tag that Mr. Gray had given him on Friday, *and we had some discussion as to why I wanted to see it,* and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, 'No,' that I was checking Mr. Gray's route, that he was short in his accounts and he had not turned any money in." (R. 90)

At an unnamed market at Mayfield to one called "Joe":

"I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray." (R. 91)

At Mrs. Lightner's Market in Mayfield:

> "I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and Company." (R. 91)

At Arjos' Market in Mayfield:

> "I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, 'Why yes,' *and he came back and wanted to know why I wanted to look at it,* and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare prices, and I said, 'No.' I said Gray was short in his accounts and had not turned the money into Swift and Company and I wanted to find out the amount." (R. 92)

At an unnamed market in Mayfield:

> "I told him I wanted to see the sales tag Mr. Gray had given him on Friday, *and he objected to that. So I told him that* Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company." (R. 93)

The foregoing constitute *all* of the conversations with respect to which Harbinson testified he made remarks of the type complained of. It will be seen that to *three* customers Mr. Harbinson testified that he merely said that Gray was short in his accounts. With respect to the others, Mr. Harbinson added the statement "and (or 'as') he had not turned the money in."

Of these eight customers three were themselves called as witnesses. One of them, Larry Lewin, of Larry's Groceteria, testified that the person who had checked with him and asked for the sales slip was not Harbinson at all, but was Gould, and he further testified that nothing at all was said about Gray, who was not even mentioned; that he, Larry, was merely asked for the sales slip and that he gave it. In other words, he denied

Harbinson's testimony point blank and confirmed Gould (R. 134 and see page 17, below).

Emmett Arjo testified for the plaintiff as follows:

> "Mr. Harbinson asked to see my sales tags. *I asked the reason for it,* and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him." (R. 101)
>
> "All that was ever said by Harbinson was that Mr. Gray was short in his accounts and that he had been accused of taking the money. I feel very friendly to Mr. Gray." (R. 102)

A comparison of the testimony of Harbinson (testifying for plaintiff) with the testimony of Arjo concerning this same conversation, shows that Arjo has embellished the conversation with some imagination.

Mr. Montemagni, of Al & Monte's Market, one of the men to whom Mr. Harbinson testified he had spoken, also testified for plaintiff and his testimony is extremely significant. He said:

> "About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. He told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it." (R. 107)

He then went on to say:

> *"Mr. Harbinson did not say anything to me to the effect that Mr. Gray had ben crooked or guilty of embezzlement or anything to that effect. All he said was that he was checking up because Gray was short in his accounts. And he said that in answer to my question as to why he wanted those tags. As I recall he did not volunteer that remark until I naturally asked him why he wanted them."* (R. 107-108)

Montemagni stated that Gray himself had come to him and that it was Gray who had said that he had been accused of taking the company's money. Mr. Montemagni was very positive

that no one but Gray had told him that Gray had been accused of taking money (R. 108-109).

On redirect examination, Mr. Montemagni was asked by plaintiff's counsel to reconcile his testimony that he had been told that Gray was short, with his testimony that no one had ever told him that Gray had been crooked or guilty of embezzlement or had taken any money. He answered that *both of the statements were true.* He reiterated that:

> "No person from Swift and Company ever accused Gray of taking the money or any money; nobody has ever told me that. All they ever asked was for the sales tags for the simple reason that Mr. Gray was short, and that was in answer to my inquiry as to why they wanted the sales tags." (R. 109, 110)

*In other words, Montemagni did not understand Mr. Harbinson's statement that Gray was short as being a statement that Gray had taken the money or was guilty of embezzlement. He understood it as a mere matter of checking the records and nothing more.*

Such was also Mr. Harbinson's view of the situation. He did not consider that his remarks that Gray was short or had failed to turn in the money to be statements that Gray had taken or embezzled the money or been dishonest. He testified:

> *"I never told anybody he was dishonest.*
>
> *"I never said to anybody anything in substance or effect that he was dishonest or crooked at any time prior to October 16, 1934 or at any other time.*
>
> *"In other words, I never said to anyone in substance that Harry Gray had embezzled money."* (R. 95, 96)

By his occasional statement that Gray had not turned in the money, he did not suppose that he was saying anything different than that the accounts were short; he testified, for example, on cross examination:

*"I cannot remember any other statements which I made to them on that subject other than the mere statement that this shortage existed."* (R. 96)

It is here to be noted that Mr. Harbinson, Gray's roommate and close friend (R. 94), was very much interested in Gray and desired to help him out (R. 95).

On Tuesday afternoon, October 16, 1934, Mr. Harbinson met Gould on the territory and learned that Gould had been sent out by the Auditor of the company to check the route; and he, Harbinson, thereupon discontinued his own investigation (R. 93, 94, 96).

We now come to Charles P. Gould. Plaintiff's case is based chiefly on Harbinson's utterances, but also in part on remarks supposedly made by Gould. But while Mr. Harbinson testified for plaintiff, Mr. Gould testified for the defendant. Gould had been a roommate of Gray and was very friendly to him (R. 148). He had helped search for the money on Saturday afternoon and believed in Gray (R. 148). He felt also that by his investigation he might be able to clear up the matter in a way satisfactory to Gray (R. 157).

On Monday, October 15, 1934 the cashier reported to Mr. Hartl that he had not received Gray's Friday collections (R. 162). Mr. Hartl was the Auditor and Office Manager. His duties as such were to take charge of the accounting, to audit all accounts throughout the plant. That duty "includes any question of discrepancy of accounts with the salesmen." (R. 162). When a discrepancy occurred or arose with reference to collection of accounts, it fell within the department of Mr. Hartl to investigate. It was not within the jurisdiction of the Sales Department, the Sales Manager, or the Assistant Sales Manager; they had no duties in the matter of discrepancies (R. 168). *Such is the uncontradicted evidence.* It was so testified to by Mr. Hartl (R. 162), by Mr. White, General Manager of the company (R. 168), and by Mr. Everett, Assistant Sales Manager. The latter

testified that the sales department had nothing to do with discrepancies in the accounts, nor had anything to do with checking the accounts, that those matters fell to the plant auditor (R. 140), and also:

> "There are definite instructions in Swift and Company to their sales department, that when discrepancies or shortages, or anything of that nature, occur on the route, the sales department has positively nothing to do with it, that man automatically comes under the jurisdiction of the plant auditor and the only part we play is replacing the man on the route." (R. 146)

> "In case a discrepancy occurs of this character, the matter of checking up on the discrepancy falls within the jurisdiction of the auditor's department and not that of the sales manager's department." (R. 147)

This question of jurisdiction with respect to checking accounts is important in connection with the question of whether Mr. Harbinson was acting within the course or scope of his employment at the time he made the remarks concerning which he testified.

When the cashier reported to Mr. Hartl on Monday morning, the latter immediately had the sales ticket numbers checked on the "checkerboard" (p. 5, supra), to ascertain what tickets were missing and unaccounted for (R. 162, 163). It was thereby discovered that not only Gray's tickets for Friday were missing but tickets were missing from the previous weeks. Mr. Hartl thereupon received permission from Gould's superior to send Gould out to check the route. Mr. Gould came to Mr. Hartl and was given a list of the unaccounted for ticket numbers and told to go to the customers and ask to see copies of all sales tags in an endeavor to find the missing ones and see what they represented (R. 149, 163). The instructions to Gould were "merely to go into the customer's store and ask if he might be permitted to look at the tickets." (R. 163). Mr. Gould did not have either the names of the customers or the amount of the purchases and he did not have Gray's list.

Mr. Hartl never talked to Mr. Harbinson and gave him no instructions or requests on the subject (R. 163).

Mr. Gould started out on the route to check on Monday afternoon and completed his task on Wednesday or Thursday (R. 150).

He testified that:

> "I did not state to any of the customers that Harry Gray had failed to turn in money or that he had stolen money or any words to that effect or that he was short in his accounts. I did not say that he was short." (R. 151)

When he went into a store he told the proprietor or manager that he wished to see their invoices. If the customer did not ask why, nothing more was said. Many customers asked why, and in response Mr. Gould replied that there were missing ticket numbers, that he had been asked to try to obtain copies of the missing tickets as the company wanted to straighten out the accounts (R. 150, 151, 154).

According to Gould's testimony, nothing whatever was said by him which either referred to or disparaged Gray. On the other hand plaintiff produced three witnesses who testified to remarks supposedly made by Gould. Mrs. Polly Guptill, a restaurant owner in Burlingame, testified:

> "Mr. Gould asked to look over the receipts. *I asked him why.* He answered that the reason was that he was sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips. I let him see them. I wouldn't say how many days or what slips he was looking for. He looked at plenty; for several months." (R. 105)

Mrs. Dorothy Hamilton Kipps was a waitress in Guptill's restaurant. She testified that she had heard the conversation between Mr. Gould and Mrs. Guptill. She said:

> "Mr. Gould came in and asked to look over the accounts saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift." (R. 106)

It is to be noted from the testimony of Mrs. Guptill and Mrs. Kipps that *whatever Gould is supposed to have said at Guptill's was in response to an inquiry as to why he wanted to see the sales tickets, and that what he said was merely that there was a shortage in accounts and that the company wanted to check up.*

Mr. Gould denied that he ever made the remark to Mrs. Guptill or Mrs. Kipps. (R. 151, 155).

One Fred Langbehn testified for plaintiff that Mr. Gould called on him to "check over the bills of things we had bought from Swift and Company" and "asked if he could see the bills;" that

> "He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken." (R. 103)

Mr. Langbehn testified that *these statements probably were not voluntered by Mr. Gould, but were probably given in response to inquiries why the bills were wanted.* He said:

> "I don't remember whether I asked Gould why he wanted to see the bills or whether he just told me. I might have asked him first. Mr. Gould did not express any ill will personally on his part toward Mr. Gray. * * * I don't remember word for word what was said." (R. 104)

Mr. Gould denied making any such statements to Mr. Langbehn (R. 152, 154).*

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*We think it certain that Mr. Langbehn and Mrs. Guptill, having been told that there were missing tickets, permitted imagination to fill in the rest during the time elapsing before the trial in 1938, or confused what Mr. Gould had told them with remarks that had been made to them by Mr. Harbinson or by Mr. Gray himself. It is evident from the testimony of plaintiff's witness Montemagni that Gray had made a tour of the route and himself spread the rumor among customers that he had been discharged for taking funds.

The investigations made under Mr. Hartl's instructions showed unaccounted for shortages of about $150.00 (R. 125), and when Mr. Gray returned from his vacation he gave his check to the company for the difference between the wages due him and the unaccounted for amounts (R. 113, 126, 130).

Gray returned from his vacation on October 29, 1934, a Sunday. He reported to Mr. Hartl the next morning and thereafter had a conversation with Mr. Hartl and Mr. White, the General Manager. He was relieved as salesman and was offered a job in the plant by Mr. White, but he did not care to take it, and his employment with the company thus ceased (R. 169).

It is admitted by Gray that the officers of the company did not accuse him of stealing any money. Gray testified:

> "*Mr. Hartl never said to me that I had stolen any money;* what he said was that I was suspended from the company; that he had wired to Chicago and that I was suspended, and *that I was short,* and my accounts came to some $150, and it was up to me to make it up. *He did not say I had stolen any money; he said my accounts did not balance, that I was short.*" (R. 125, 126)

Mr. Hartl testified without contradiction that what he told Gray was:

> "That it wasn't a question of anything except that this money had not been turned in to us, we had not received it, and therefore any moneys collected by anyone in the employ of Swift and Company belonged to Swift and Company and they were not relieved of responsibility until they had turned it in. * * * I told him that we didn't accuse him of anything except carelessness, and he admitted he was careless." (R. 163, 164)

> "I never accused Mr. Gray of anything except carelessness. I never accused him of taking any money and converting it or embezzling it or stealing it. The discussion I had with Mr. Gray was lengthy but all repetition. The repetition was that he was concerned and repeatedly said

> he wanted me to answer him as to whether I thought he took the money or not. My reply was that it wasn't a question of whether he took it or not, the question was we had not received it." (R. 164, 165)

(See also testimony of Mr. White (R. 169) and defendant's Exhibit G, a letter from Mr. White to Mr. Gray (R. 126).)

After leaving the service of the company Gray made efforts to obtain employment. He testified concerning his efforts and lack of success, but offered no evidence that any supposedly slanderous utterances had ever been made to any of the people of whom he sought employment or brought to their attention. There is no evidence to show the connection between the supposed slander and his failure to obtain employment (Appendix, p. 15). He later went to Los Angeles and obtained employment there.

In the Spring of 1935 there was an interchange of correspondence between Gray and Swift, initiated by Gray (Def. Ex. H and G, R. 127) in which they showed entire friendliness toward each other and no animosity whatsoever. At no time did Gray ever inform anybody at the company that he had been slandered (R. 125), although he claims that he had learned of the supposed utterances when he himself went over the route upon return from his vacation, in October, 1934. The present suit was commenced on October 11, 1935, a few days before it would have been barred by the statute of limitations. No previous suggestion had ever been made by plaintiff that he had considered himself wronged by any supposed slander.

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## SPECIFICATION OF THE ASSIGNED ERRORS TO BE RELIED ON.

Appellant assigned fifty-seven errors and in this brief relies on forty-seven. These errors may be grouped according to their general subject matter in the four groups noted on pages 3

and 4, supra. The Roman numerals refer to the assignments and the Arabic to the page of the record where the assignments appear.

*a. Relative to the matter of privilege*:—

I (24), II (24), III (25), IV (26), VI (27), VII (28), VIII (30), IX (31), XI (32), XII (32), XIII (33), XIV (34), XV (35), XVI (36), XVII (36), XVIII (37), XIX (38).

*b. Relative to the authority of the employees to make the remarks*:—

II (24), III (25), IV (26), XX (39), XXI (39), XXII (40), XXII-A (41), XXIII (41), XXVII (45), XXVIII (46), XXIX (46), XXX (47), XXXI (48), XXXII (49), XXXIII (49), XXXIV (50), XXXV (51), XXXVI (52), XXXVII (52), XXXVIII (53), XXXIX (54), XL (55), XLI (55), XLII (56).

*c. Relative to the non-defamatory character of the words*:—

IV (26), XXIV (42), XXV, (43).

*d. Relative to efforts to obtain employment*:—

XXVI (44), XLVI (59), XLVII (60), XLVIII (61), XLIX (61), L (62), LI (63), LII (63).

## ARGUMENT

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### I.

### THE UTTERANCES COMPLAINED OF WERE MADE ON A PRIVILEGED OCCASION AND WITHOUT MALICE.

#### A. Assignments of Error Involved

I. (R. 24)

"The Court erred in denying the motion made by the defendant at the close of plaintiff's case for a nonsuit. The motion so made was as follows: 'The defendant in this case moves for a judgment of nonsuit, or dismissal, on the following grounds: First, that it appears affirmatively from the evidence that the utterances complained of are privileged in character, and that under the provisions of Section 47 of the Civil Code of California and under the Common Law, no cause of action arises therefrom; inasmuch as it appears by uncontradicted testimony that the only communications here made were communications without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent; or, three, who is requested by the person interested to give the information.'

"The said motion was thereupon denied by the Court, to which ruling counsel for defendant then and there excepted."

II. (R. 24, 25)

"The Court erred in denying a motion made by the defendant at the close of all evidence for a directed verdict in favor of the defendant. The said motion was made as follows: 'I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground that it appears by uncontradicted testimony that the statements here complained of are privileged in character and that it appears without contradiction that there was no actual malice, and particularly on the ground that it appears that the statements complained of were made by

one who is interested in the communication to another person interested in the communication and were made by a person interested and who was requested by the person interested to give the information.

" 'I assign as an additional ground for a directed verdict for the defendant in this case that the uncontradicted evidence shows that the communication here involved is a privileged communication having been made by a person interested therein to another interested therein, and on the further ground that it was made in response to an inquiry, and on the ground that the uncontradicted evidence shows absence of express malice. * * *'

* * * * * * *

"The Court denied said motion for a directed verdict, to which ruling defendant by its counsel then and there excepted."

III. (R. 25, 26)

"The Court erred in denying the defendant's motion for judgment notwithstanding the verdict, said motion being made before judgment had been entered upon the verdict. The motion was as follows: 'I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated in support of my motion for a directed verdict, to wit, that the uncontradicted evidence in this case shows that any communications made were those of a privileged nature, by a person interested therein to another person interested therein, without malice * * *'

"The Court denied said motion for judgment notwithstanding the verdict, to which ruling the defendant then and there excepted."

IV. (R. 26)

"The Court erred in entering judgment in favor of the plaintiff and against the defendant upon the verdict."

Other assignments of error, having to do with instructions improperly refused and instructions improperly given, all with respect to privilege, are set out at the beginning of appropriate subdivisions of the argument, pages 43-51, infra.

### B. Summary of Argument

**The occasion for the utterances of Gould and Harbinson was the checking of the accounts of Swift with its customers and was therefore privileged. The utterances were made in response to inquiries of the customers, without malice toward Gray and without belief that Gray was being disparaged. Moreover, actual malice, if any, of an employee is not imputable to a corporation. The facts being undisputed, it was for the court to declare that the occasion was privileged. For these reasons the court should have nonsuited the plaintiff, directed a verdict against him, or entered judgment for the defendant notwithstanding the verdict. On the contrary the court held as a matter of law that the occasion was not privileged, declined to instruct the jury on the subject of actual malice, and instructed it that malice was to be presumed from the mere fact of the utterances.**

### C. Discussion

#### 1. Statement of the general principles of qualified privilege.

*California Civil Code,* Section 46, defines slander as a publication which is not only false but which is unprivileged. *California Civil Code, Section* 47, defines a privileged publication as follows:

> "A privileged publication is one made * * *
>
> 3. In a communication without malice, to a person interested therein (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

These subdivisions of Section 47 "completely eliminate from the law of libel a communication without malice" of the types

there described. *Heuer v. Kee,* 15 Cal. App.(2d) 710, at 714, 59 Pac.(2d) 1063.

A communication on a privileged occasion made without malice is not slanderous even though false in fact. Truth is not an ingredient of the defense. *Jones v. Express Publishing Co.,* 87 Cal. App. 246, 262 Pac. 78. Judge Leon R. Yankwich in his *"Essays on the Law of Libel",* p. 151, pungently puts it thus: "A lie is privileged if told on a privileged occasion, without malice."

The whole question with respect to privilege is this: Is the occasion a privileged one? The privilege appertains to the occasion. If the occasion was one where it was appropriate for the one party to speak to the other upon the general subject matter, a remark made in the course thereof without actual malice is not actionable, though untrue. The doctrine of privilege is the product of the realization that the affairs of life must go on, and that while people ought not to speak ill of others, there are certain occasions where the convenience and the interests of society require that people be permitted to speak without the peril of legal punishment if they prove to be in error.

As stated in *Jones v. Express Publishing Co.,* supra, at 255:

> "The doctrine of privileged communications rests essentially upon public policy. Under proper circumstances the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and circumstances may for the public good absolve one from punishment for such communications even though they be false. (Newell on Libel, 340, sec. 341)."

Proper protection against abuse is provided in the case of qualified privilege by the requirement that there be no malice.

The malice referred to is actual malice.

*Civil Code,* Section 48, itself provides:

> "In the cases provided for in subdivisions 3, 4 and 5 of the preceding section, malice is not inferred from the communication or publication."

If a remark is made in good faith and without any desire or disposition to injure the party of whom it is spoken and without any spite or ill will toward him, then it is not malicious. In other words the malice required to defeat privilege

> "is malice in the popular conception of the term; that is to say as a desire or disposition to injure another founded on spite or ill will."
>
> *Siemon v. Finkle,* 190 Cal. 611, 213 Pac. 954;
> *Davis v. Hearst,* 160 Cal. 143, 116 Pac. 530.

This matter of malice is more fully discussed at pages 36 to 42, below.

*Massee v. Williams,* 207 Fed. 222, (C. C. A. 6th), at 230, defines a privileged communication thus:

> "A privileged communication comprehends all bona fide statements in the performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them or the interest of the person to whom they are made. [Citations omitted.] A conditionally privileged communication is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal excuse."

36 *Corpus Juris* 1262 defines privilege thus:

> "Generally, any communication published by one in good faith to another, in order to protect his own interest or to protect the corresponding interest of another in a matter in which both are concerned, is privileged, when the subject matter of the publication makes it reasonably necessary under the circumstances to accomplish the purpose desired."

The occasions of privilege are as numerous and varied as the affairs of man. In 26 *California Law Review,* 226, at 228, it is said, referring to *California Civil Code,* Sec. 47, subd. 3:

> "The breadth of this definition forbids any attempt to confine the privilege referred to within narrow limits, and by the same token lessens the fear that a rule grounded upon public policy will in its future application be so narrowly interpreted as to defeat that policy."

Before reviewing cases of close analogy, the pertinent facts may summarily be restated.

**2. The facts and circumstances of the occasion and the utterances here involved.**

The facts are fully stated and documented to the record at pages 4 to 18, supra. They are here summarily restated. The occasion on which the remarks upon which this suit is predicated were made was the checking of the accounts between Swift and its customers, who had been served by Harry Gray on Friday, October 12, 1934. On Saturday, October 13, 1934, it had been found that the accounts were short. Whatever the cause of the shortage, whether dishonesty of some individual named or unnamed, or unfortunate misplacement, a shortage did in fact exist;—in other words, money was missing. Moneys had been paid by the customers to be transmitted to Swift for goods purchased by them, and those moneys had not come into the company's records. It was, as a matter of business sense, important for Swift to ascertain the facts, and it was equally desirable for the customers that Swift's records properly reflect payments made.

In order that the facts might be ascertained, so that whatever was thereafter to be done might be done intelligently and fairly—fairly to Swift, fairly to Gray, and fairly to the customers,—one course alone was open. Inquiry had to be made, and it had to be made of the customers. In short, the route had to be checked. This was so much the obvious thing to do that the plaintiff Gray at once realized it. The word "shortage" was first used by him, and the suggestion that the route be checked was first voiced by him. (See statement of facts, pp. 8, 9, supra.)

Gray *volunteered* to make out a list of the customers and the approximate amounts collected from them, *and he did so for the purpose and with the intention that the route be checked and the shortage ascertained,* stating that he had enough money coming to him from the company to cover any shortage found to exist. Indeed, he asked that the check be made by others instead of doing it himself, in order that he might be permitted to go upon his vacation as planned. *Volenti non fit injuria* (See statement of facts, pp. 7-9, supra.)

Harbinson and Gould independently checked the route. What Harbinson did was to ask the customers what money they had paid Gray on Friday. What Gould did, during the course of his check, was to ask the customers for permission to see past sales tags. *Nothing was ever said by either one to any customer concerning Gray until after the customer asked why Harbinson wanted to know what moneys had been paid or why Gould wished to see the sales tags, or objected to replying or showing the requested tags until informed of the reason for the inquiry.* It was then, and *only in response to the inquiries of the customers and only to explain the reason for the check,* that any of the utterances complained of are supposed to have been made.

It is self-evident, too, that whatever Harbinson or Gould uttered was said without any malice or design to injure Gray. They did not speak to the customers in the presence of anyone else, but waited until anyone else present had gone (R. 101). It is to be recalled that Harbinson and Gould were both friends of Gray, roommates or former roommates, and that Harbinson was Gray's principal witness. He was very much interested in him and desired to help him out at the time of the check (R. 95). Harbinson did not even suppose that he was disparaging Gray. He testified that he never told anybody anything in substance or effect that Gray was dishonest or crooked or that he had embezzled money (page 14, supra).

It is clear that Harbinson, in making the utterances that he did, was stating only what he supposed to be an objective fact,

namely that money collected had not cleared through the department of Swift designated for that purpose. Harbinson did not suppose that he was giving an explanation for the existence of this objective fact, or placing any blame, and in using the term "shortage" to describe the situation he was only speaking the word used for the same purpose by Gray himself on Saturday in his presence. Indeed the very fact that an investigation was being made to ascertain the facts demonstrates the lack of malice. (Compare discussion on p. 78, infra.)

As to Mr. Gould the case is the same as with respect to Harbinson. He indeed denied that he had said anything at all of Gray, and those who testified as to conversations with him confirmed that he volunteered no remarks and spoke only when asked for the reason for his check. The evidence is uncontradicted that Mr. Gould felt that he could by his investigation clear things up in a way satisfactory to Gray. (See statement of facts, p. 15, supra.)

We think it self-evident that the occasion was a privileged one and that the communications were made without malice.

**3. The authorities demonstrate that the occasion was privileged.**

In *McLaughlin v. Standard Accident Ins. Co.,* 15 Cal. App. (2d) 558; 59 Pac.(2d) 631 (hearing denied by the Supreme Court), the plaintiff had for many years been employed by the defendant company. Included in his duties were those of soliciting insurance, collecting premiums, and remitting the money so collected to the company. Having fallen behind in remitting collections and being unable when called upon by the company to pay the amounts claimed to be due, the matter was reported by it to its fidelity bonding company, and the plaintiff's connections with the defendant were terminated. One Pierce was appointed agent in his place, and the plaintiff entered into a contract with Pierce, transferring to him the control of his insurance soliciting business. The manager of the defendant com-

pany then addressed letters to thirty-four policy holders, each of whom was at the time a client of the plaintiff. These letters advised that the plaintiff had made arrangements with Pierce to handle his insurance business, that the plaintiff would still be interested in the business, but requested that all premiums on policies must in all cases be paid directly to Pierce and not to the plaintiff McLaughlin. The letters concluded in this typical way:

> "Our books show that there is an unpaid premium due us of $92.50 on Accident and Health policy dated January 5, 1932. If there is any discrepancy in this, please advise us immediately."

The plaintiff sued for libel, contending that each of the thirty-four customers had already paid the premiums to plaintiff, that he had in turn accounted for the premiums, and that the defendant thus meant to inform the customers that the plaintiff was guilty of the crime of embezzlement and not to be trusted with further premium payments.

The court's opinion discusses several defenses and concludes that, if for no other reason, the plaintiff could not recover because the communication was privileged:

> "In view of our conclusion that the statement made by defendants to the various persons holding policies in the Standard Accident Insurance Company, even if given the meaning attributed to it by plaintiff, was true, it is not necessary to consider at length the further contention of defendants that even if untrue, it was a privileged communication made without malice. In this behalf it is sufficient to say that not only does the evidence show it to have been true, but also that it was made under circumstances entitling it to be regarded as privileged, and the implied finding from the verdict that it was made maliciously is not sustained by the evidence.
>
> "It follows that the trial court erred in denying the motion of defendant for judgment notwithstanding the verdict. The judgment is therefore reversed, and the cause

remanded to the superior court, with direction to enter judgment in favor of the defendants."

*Warner v. Missouri Pacific Railway Co.,* 112 Fed. 114 (Cir. Ct., W. D. Tenn.) The superintendent of the railroad, whose duties included the supervision and management of the railway line, depots and stations, wrote a letter to the grantee of the station lunch and newsstand concessions, calling his attention to an alleged misbehavior of the plaintiff, who was a news agent in charge of the stand, inviting an investigation of the facts. The court said:

> "The letter is a communication by him to another employe of the company, or, what is the same thing, the grantee by contract of the privileges of occupying the station house for the purpose of serving the passengers awaiting there with lunches and other conveniences for their use. It concerns a suggested investigation by that employe of the alleged indecent behavior of a subemploye of the defendant company, or, what is the same thing, the employe of the grantee of the privilege who attended to the lunch stand and served the wants of the passengers in the station house. It is difficult for my mind to conceive a more thoroughly privileged communication, on the most familiar rules of law on that subject, and I have been strongly inclined to dismiss at least the suit of that subemploye on that ground." (p. 115)

The court was of a similar opinion with respect to co-plaintiffs, who were on the occasion to be investigated mere companions of the sub-employee.

*Flowers v. Smith et al.,* 80 S. W. (2d) 392 (Tex. Civ. App.). This was an action for slander against the West Texas Utilities Company, of which plaintiff was a customer. The plaintiff had installed a private power system in his home, thus reducing his electric bill to the company. Being suspicious, the company removed its meter from the porch of plaintiff's home and placed it on a pole thirty feet from the ground. Seeing this done, plaintiff's wife telephoned defendant's manager and asked him why

the meter had been removed from the porch. In reply, the manager went to plaintiff's home and said to plaintiff's wife:

> "I will be frank with you. It is because your husband has been wiring around the meter."

Plaintiff thereupon sued the power company for slander claiming that he had been charged with the offense of stealing electric current, a crime under the Texas law. The court agreed that the words were false and slanderous, but it held that the defendant was protected by privilege, and it affirmed a judgment for defendant on demurrer to the complaint. Because of so many similarities to our case, we quote at length:

> "A solution of the question presented turns upon whether or not the alleged slanderous accusation, * * * was a qualifiedly privileged communication. Perhaps it is more accurate to say that the real question is: Was the occasion in question under the facts alleged a privileged one? If yes, this case should be affirmed.
>
> "* * * The statement attributed to Smith was slanderous per se, and was actionable, unless qualifiedly privileged. The following is an oft quoted and the generally accepted rule in determining such question: 'A communication made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable.' Newell on Slander & Libel (4th Ed.) p. 416, §391.
>
> "* * *
>
> The difficulty here, as always, is not in ascertaining general legal principles, but in making application of these. In discussing a similar situation, the court in Watt v. Longsdon, 69 A. L. R. 1022, * * * quotes the following with approval: *'If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society.'*
>
> "* * *

> Applying these principles, we have here a case where the husband sues for a slanderous statement made to his wife *at her special instance and request,* concerning a matter in which she was as much interested as her husband. * * * She had a right to make inquiry respecting a matter affecting her household. *Plainly it was the duty of Smith to protect the interest of his company; and that the communication was made in furtherance of such duty is not denied.* It is not contended that such statement was maliciously made, and no inference of such may be drawn from the mere making of the statement, if it were qualifiedly privileged."

*Morcom v. San Francisco Shopping News,* 4 Cal. App.(2d) 284; 40 Pac.(2d) 940. The defendant published the Oakland Shopping News, which was distributed on doorsteps, porches and yards of residential buildings in Oakland. There was under consideration before the City Council of Oakland a proposed ordinance to prohibit the scattering of advertising matter upon public or private property. The newspaper published articles concerning the attitude of the plaintiff, as Mayor of Oakland, toward the ordinance, impugning his motives. For this the Mayor sued for libel. A demurrer was sustained and judgment rendered thereon. The appellate court held that the communication was a privileged one, as being to a person interested by one who is also interested, or who stands in such relation with the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent. It said:

> "The effect of the ordinance in question would be to prohibit, or, at least, seriously hamper, the continued operation of the distribution of the publication. The subject of the articles complained of would, therefore, be a communication by the defendant (who would naturally be interested therein because it vitally affected its business) to its readers (who would be interested therein because of the information they derived of shopping bargains, sales, etc., which they obtained without cost from their perusal of such publications)." (p. 288)

The judgment was reversed but solely because the defense of privilege is defeated if the publication is made with malice, and it was alleged in the complaint that the publication was made maliciously, an allegation which was sufficient to carry the complaint past demurrer. This decision clearly demonstrates the extensive scope of our California code definition of qualified privilege.

And see *First Texas Prudential Insurance Co. v. Moreland,* 55 S. W. (2d) 616 (Tex. Civ. App.), and *Browne v. Prudden-Winslow Co.,* 186 N. Y. Sup. 350; 195 App. Div. 419.

A comparison of the occasion of the utterances in the present case with any of the several definitions of privilege demonstrates that occasion to have been privileged. Following the definition in *Massee v. Williams,* 207 Fed. 222, 230, quoted on page 26, above, the utterances here were unquestionably made in the course of remarks made for the fair and reasonable purpose of protecting Swift's interests, and also for the fair and reasonable purpose of protecting the interests of the customers to whom they were said, since the interests of the customers required that the books of Swift actually reflect payments made for goods purchased.

Turning to *California Civil Code,* Section 47, Subd. 3, we find that the communication falls within every branch. First, Swift was certainly interested in the matter in hand, namely, the state of the accounts. Second, it stood in such a relation to the parties to whom the remarks were made to afford a reasonable ground for supposing the motive for the communications to be innocent;—the relationship was the business relationship of seller and buyer, creditor and debtor, and the communications referred to sales made and accounts existing. Third, the information given, namely, the reasons for checking the accounts, was requested by the customers, and they were interested in the communication for the reasons already stated.

Again, the communications were privileged within the definition appearing in 36 *Corpus Juris,* 1262, and quoted at page 26,

supra, inasmuch as the communication was made in order to protect the interests of Swift, the matter—the checking of the accounts—was one with which both Swift and the customers were concerned, and one that was reasonably necessary.

The occasion was therefore a privileged one and the communications are protected unless made with actual malice.

**4. The question of the existence of privilege was one for the Court.**

Where there is no dispute as to the facts and circumstances of an occasion, the question of whether it was privileged is one for the court and not for the jury.

*Carpenter v. Ashley,* 148 Cal. 422, at 423; 83 Pac. 444:

> "The facts and circumstances under which the words were spoken were undisputed and therefore the question whether they were privileged was a question of law for the court to determine. * * * Sometimes the question of privilege is one of mixed fact and law, and in such case it is proper for the court to submit it to the jury with proper instructions; but where, as in the case at bar, the facts touching the circumstances under which the alleged defamatory words are spoken are not in dispute, the question is for the court."

As stated in *Warner v. Missouri Pacific Railway Co.,* 112 Fed. 114:

> "The question of privileged communication, on the face of the alleged libel, is always one of law for the court on demurrer. 13 Enc. Pl. & Prac. 59. And also it is a question of law when the facts are conclusively developed on the trial." (P. 115)

The authorities could be multiplied (See, e.g. *Jones v. Express Co.,* 87 Cal. App. 246, 256; 262 Pac. 78; *John W. Lovell Co. v. Houghton,* 22 N. E. 1066, 116 N. Y. 520) but it is not necessary.

In the present case there was no dispute at all as to the facts and circumstances under which the remarks, if made at all, occurred. There was not even any dispute as to what Harbinson said. There were disputes as to what Gould said, and there was also a dispute as to whether Gould and Harbinson were acting within the course and scope of their employment. But there was no dispute as to the occasion and circumstances under which was said whatever was in fact uttered. The situation is exactly the same as in *Carpenter v. Ashley,* supra, where there was a dispute as to the speaking of the words, but none as to the occasion of their speaking.

The existence of the privilege was therefore purely a question of law for the court.

**5. There was no evidence of actual malice to go to the jury, and the Court should therefore have granted a nonsuit or directed a verdict.**

The occasion being privileged as a matter of law, the only question remaining was whether there was actual malice in the speaking of the words. If there was any substantial evidence of actual malice, the court should have presented that issue to the jury on proper instructions. If there was no evidence of actual malice, the court was under the duty of taking the whole case from the jury. *It did neither.* As said in 37 *Corpus Juris,* 107-108, if the occasion is privileged,

> *"the court must determine whether there is sufficient evidence of malice to send the case to the jury, and, if there is not, it becomes the duty of the court to dispose of the case by nonsuit or dismissal, direction of a verdict, or otherwise."*

And see *Townshend* on *Libel & Slander,* Sec. 288.

*Newell* on *Slander and Libel* (3rd ed.), pp. 1007, 1008, Sec. 981, states:

"The court will generally direct judgment of nonsuit to be entered for the defendant: * * *

(7) If the occasion is clearly or admittedly one of qualified privilege, and there is no evidence, or not more than a *scintilla* of evidence, of malice to go to the jury. *If the evidence adduced to prove malice is equally consistent with either the existence or the nonexistence of malice, the judge should direct a nonsuit; for there is nothing to rebut the presumption which the privileged occasion has raised in the defendant's favor.*"

And in Sec. 394, p. 396, Newell says:

"The presumption in favor of the defendant arising from the privileged occasion remains till it is rebutted by evidence of malice; and evidence merely equivocal, that is, equally consistent with malice or *bona fides,* will do nothing towards rebutting the presumption."

Thus, in *Jackson v. Underwriters Report, Inc.,* 21 Cal. App. (2d) 591, 69 Pac.(2d) 878 (hearing denied by the Supreme Court), a nonsuit was affirmed, because the occasion was privileged and no sufficient evidence of actual malice was produced.

In *Jones v. Express Publishing Co.,* 87 Cal. App. 246, 256, the court said:

" 'It is exclusively for the judge to determine whether the occasion on which the alleged defamatory statement was made, was such as to render the communication a privileged one . . . If, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the case from the jury . . .' (Newell on Libel, 383, sec. 345.)"

Malice cannot be presumed. On the contrary, *Jones v. Express Publishing Co.,* supra, at p. 256, points out:

"And when the facts clearly constitute a privileged communication even though the language employed under other circumstances might be slanderous per se, *the very privilege*

> *creates a presumption that the communication is used innocently and without malice.* (Newell on Libel, 381, sec. 342; Jones on Evidence, 3d ed., 34, sec. 29.)"

And see, also, *Locke v. Mitchell,* 7 Cal.(2d) 599; 61 Pac.(2d) 922.

In *Jackson v. Underwriters Report, Inc.,* supra, the court said:

> "And Section 48 of said Code provides that malice is not inferred from communications or publications falling within the provisions of subdivisions 3, 4 and 5 of said Section 47." (P. 593)

To the same effect is *Misao Yoshemura Kurata v. Los Angeles News Pub. Co.,* 4 Cal. App.(2d) 224; 40 Pac.(2d) 520.

As said in *First Texas Prudential Ins. Co. v. Moreland,* 55 S. W.(2) 616, 620 (Tex. Civ. App.)

> "The occasion being privileged, the presumption of good faith obtained. The burden was on the appellee to rebut this presumption."

Actual malice requires a motive to do harm—a wicked motive. It refers to an evil cast of mind. It is the "malice of malevolence" (*Yankwich, "Essays on the Law of Libel",* p. 133). If there is no evidence of a motive to injure, a nonsuit or directed verdict *must* follow. *Lovell Co. v. Houghton,* supra; *Hemmens v. Nelson,* 34 N. E. 344, 138 N. Y. 174, approved in *Davis v. Hearst,* 160 Cal. 143, at 164 (116 Pac. 530), where it is said:

> "It should be added that when the Civil Code (Sec. 47) speaks of privileged publications, and in Section 48 declares that malice is not inferred from the publication of such matters, it means nothing but this malice in fact, as abundantly appears from the authorities above cited, and as is expressly laid down in such cases as *Hemmens v. Nelson,* 138 N. Y. 174 [34 N. E. 342, 20 L. R. A. 440], and Clark v. Molyneux, 3 Q. B. Div. 246. And, finally, it should be remarked that in all classes and kinds of cases in which exemplary damages are sanctioned, there must be made to appear to the satisfaction of the jury, *the evil motive, the*

*animus malus, shown by malice in fact, or by its allied malignant traits and characteristics evidenced by fraud or oppression."*

In *First Texas Prudential Ins. Co. v. Moreland,* supra, an express jury finding of malice was held to be unfounded and the cause reversed. The case involves utterances made in the checking up of shortages in an employee's accounts.

In *Jackson v. Underwriters Report,* supra, the court remarked that there was evidence of no feeling of any kind, either for or against the party supposedly defamed, and that therefore nonsuit must follow. *A fortiori* the same result must follow where the feeling of those speaking was a friendly one.

It must be clear that Harbinson and Gould, both friends of Gray, had no intent to injure him and did not suppose they were saying anything derogatory of him (See pages 14, 17, supra). The very most that may be said of them is that they were careless or failed to exercise judgment in their speech. But *Davis v. Hearst,* 160 Cal. 143, at 167, approving a passage from *Odgers on Libel and Slander,* says:

> "And Odgers, who, it will be remembered, in his learned work declines to consider the existence of any malice but malice in fact, sums up the English law as follows:
>
> " '*Mere inadvertence or forgetfulness, or careless blundering is no evidence of malice.* (Brett v. Watson, 20 W. R. 723; Kershaw v. Bailey, 1 Exch. 743; 17 L. J. Ex. 129; Pater v. Baker, 3 C. B. 831; 16 L. J. C. P. 124) *Nor is negligence or want of sound judgment* (Hesketh v. Brindle, (1888) 4 Times L. R. 199), or honest indignation (Shipley v. Todhunter, 7 C. & P. 690)'."

As a matter of fact in the present case there was no real contention by the plaintiff that any utterances were made with actual malice. Plaintiff's contention was that malice was to be presumed from the saying of the words, and he requested the court to so charge the jury, and this the court erroneously did. These instructions are assigned by us as error. We discuss them on pages 49 to 51, infra.

**6. No actual malice of its employees may be attributed to the Corporation.**

There is still another reason why, the occasion being a privileged one, the court should have directed a verdict for the defendant. Even assuming that there was some evidence of actual malice on the part of Harbinson or Gould, either or both, their actual malice cannot be imputed to the corporation. It is the rule that where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if any, unless it had expressly authorized the employee to slander the plaintiff, or knowing that he had uttered a slander, authorized and approved what he said. In other words, there must be express authorization or express ratification.

This very matter was decided in *Warner v. Missouri Pacific Ry. Co.*, 112 Fed. 114.

The same result is demanded on principle. The principles are fully discussed in *Davis v. Hearst*, 160 Cal. 143; 116 Pac. 530. That case points out that the actual malice necessary to destroy the privilege of an occasion is the same *animus malus* necessary to entitle one to exemplary damages. Exemplary or punitive damages may never be awarded against a corporation for the acts of an employee upon a mere showing of malice of the employee. Where actual malice is no ingredient of the tort, the corporation may be held liable for compensatory damages, but may not be punished for accompanying malice. And where actual malice is necessary to constitute liability for the act, the principal may not be held liable, and the relief must be restricted to the agent personally.

We quote at length from *Davis v. Hearst*, 160 Cal. 143. At pages 164 and 165, following the passage quoted on pages 38 and 39 above, the court said:

> "*Imputed malice in fact.*
>
> "Since the *animus malus* must be shown to exist in every case before an award in punitive damages may be made

against a defendant, since the evil motive is the controlling and essential factor which justifies such an award, it follows of necessity that no principal can be held in punitive damages for the act of his agent, unless the particular act comes within the principal's specific directions or general suggestions, or unless the principal has subsequently ratified it, such ratification presupposing, it is said, original authorization. * * *

"While to the specific proposition that *malice in fact is not imputable to the master merely from the act of the employee,* reference may be made to Haines v. Schultz, 50 N. J. L. 481, [14 Atl. 488] (And other citations) * * * and 4 Odgers on Libel and Slander, 367, where it is said.

" 'In all these cases the malice proved must be that of the defendant. If two persons be sued the motive of one must not be allowed to aggravate the damages against the other . . . *Nor should the improper motive of an agent be matter of aggravation against the principal.*' "

*Newell* on *Slander and Libel,* (3rd ed.) Sec. 394, p. 396, speaking of malice necessary to defeat privilege, states:

"The facts tendered as evidence of malice must always go to prove that the defendant himself was actuated by personal malice against the plaintiff. In an action against the publisher of a magazine, evidence that the editor or author of any article, not being the publisher, had a spite against the plaintiff is inadmissible."

The identity of the rules respecting malice necessary to destroy privilege and malice essential to punitive damages appears in *Misao Yoshimura Kurata v. Los Angeles Pub. Co.,* 4 Cal. App. (2d) 224, 40 Pac.(2d) 520, where the court says (p. 228):

"The lower court was right in striking the item allowed for exemplary damages as there was no evidence whatever to sustain malice, and malice is not presumed from privileged publications. Davis vs. Hearst, 160 Cal. 143, 116 P. 530; White v. Nicholls, 3 How. 266, 11 L. Ed. 591."

There is, of course, no room for any contention that Swift and Company authorized slanderous remarks by any of its employees or ratified any. If Harbinson was ever instructed to do anything in the premises, he was merely told to take Gray's list (Def. Ex. C) and check the route. Gould was merely instructed to take a list of numbers of missing tickets and find the tickets. There was no ratification of anything that was said because it was not until the action was instituted a year later that the defendant was even aware that slander was supposed to have been said, and it is conceded that none of the officers of the company ever stated to anyone that the plaintiff was guilty of anything but carelessness. (See pages 19, 20, supra.)

**7. A nonsuit, a directed verdict or a judgment notwithstanding the verdict should have been ordered.**

For the reasons already stated, the trial court should have ordered a nonsuit, granted a directed verdict, or ordered judgment notwithstanding the verdict. Its failure to do so constitutes respectively, our Assignments of Error Nos. I, II, III, and IV, quoted at pages 22 and 23, supra.

**8. The Court erred in failing to give certain instructions requested by the defendant on privilege and malice**

In addition to its motions for nonsuit, verdict, and judgment, the defendant presented the question of privilege and the allied question of malice to the court by request for instructions. If the motions were for any reason properly denied, the issue should have been presented to the jury on an appropriate charge. But the trial court refused *each and every request* on the subject and gave to the jury no inkling that such a defense as privilege was recognized by law. Indeed, as we shortly show, it in effect charged the jury to the contrary.

**(a) On privilege itself.**

The Assignments of Error involved on this point are:

VIII. (R. 30, 31)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 17, reading as follows:

" 'Sometimes remarks are made in circumstances and on occasions which the law calls "privileged." If a remark is made on a privileged occasion, then even though it is not true and is defamatory, nevertheless it is not regarded as slanderous, and there is no liability unless the words were spoken maliciously, that is to say, with actual malice. If a statement or remark is made without malice by a person interested therein to another person interested therein, it is a privileged publication.'

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon their verdict."

XVI. (R. 36)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 25, reading as follows:

" 'A communication, though in fact unfounded in truth, is privileged if made in good faith in the performance of any duty and with a fair and reasonable purpose of protecting the interests of the person making it or the interests of the person to whom it is made. I therefore instruct you that even if you find that the defendant uttered concerning the plaintiff the words complained of, yet if you find that those words were said in good faith in carrying out the company's business and with a fair and reasonable purpose of protecting the interests of the company, then the defendant cannot be held liable even though what was said was not well founded in fact.'

"To which refusal to give said requested instruction, the defendants excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XIX. (R. 38)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 28, reading as follows:

" 'Even though you find that the defendant made the statements with respect to the plaintiff alleged in the complaint, nevertheless if you further find that the defendant was interested therein and that such statements were made by the defendant in a communication, without malice, to a person interested therein, I instruct you that the publication is a privileged one and that your verdict must be for the defendant. In determining whether or not the communication is privileged, you may consider all the facts and circumstances surrounding the transaction in order to determine whether or not the defendant was interested in the communication and whether or not the persons to whom the communication was made were also interested therein.'

"To which refusal to give said requested instruction the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

Defendant's proposed Instruction No. 25, quoted in Assignment of Error No. XVI follows the language of *Massee v. Williams,* 207 Fed. 222, at 230. Defendant's Proposed Instruction No. 28, quoted in Assignment of Error No. XIX follows the language of *California Civil Code,* Section 47.

These instructions should have been given if the court's failure to take the case from the jury was the result of a belief that the circumstances of the occasion of the alleged utterances were not undisputed.

**(b) On imputation of actual malice to Swift.**

The Assignments of Error involved are:

XIII. (R. 33, 34)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 22, reading as follows:

" 'Where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if there was any, unless it had expressly authorized the employee to slander the plaintiff maliciously, or knowing that he uttered a slander maliciously, authorizes and approves what he said. Consequently, if the occasion of an utterance is privileged within the meaning of the instructions already given to you, a corporation cannot be held liable for utterances of an employee unless first, those utterances were made with actual malice, and in addition, the corporation had expressly authorized the employee beforehand to make the utterance maliciously or thereafter approved of the utterance, knowing of its falsehood.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XIV. (R. 34)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 23, reading as follows:

" 'There is no evidence whatever that the defendant corporation ever expressly authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice can be charged to the corpora-

tion. You will therefore return a verdict in favor of defendant and against the plaintiff.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XVII. (R. 36, 37)

"The court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 26, reading as follows:

" 'Even if you find that some employee of the defendant, while checking the plaintiff's route, made an utterance concerning the plaintiff, as he alleges in the complaint, and even if you find that the utterance was false and made with actual malice, nevertheless you cannot hold the defendant corporation liable for such remarks, if any, unless such employee had been expressly ordered beforehand to go out and make the remark or afterwards the corporation learned that such a remark had been made and approved of it with knowledge of its falsehood.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XVIII. (R. 37)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 27, reading as follows:

" 'There is no evidence whatever in this case that the defendant corporation ever expressly authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice is chargeable to the

corporation. Consequently, in the event you find that such utterances, if there were any, were made on a privileged occasion as has been explained to you, your verdict must be in favor of the defendant and against the plaintiff.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

These instructions were proper as shown by our discussion at pages 40 to 42, supra.

On the other hand, if for some reason which is not apparent to us, malice, *if any,* of Harbinson and Gould could be legally attributed to Swift, and if the court's failure to take the case from the jury was based on a supposition that there was some evidence from which actual malice on the part of these two employees might be inferred, *then it was the duty of the court to instruct the jury upon the subject of actual malice so that it could find upon the issue.*

We thus come to the next group of instructions.

**(c) On the existence of actual malice.**

The Assignments of Error involved are:

XII (R. 32, 33)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 21, reading as follows:

" 'Where the facts and circumstances under which an alleged defamatory publication is made are undisputed, the question of privilege is one for the Court. Even if you should find that the defendant uttered of the plaintiff the words set out in the complaint, the circumstances under which they were said are undisputed. The Court has considered the matter and instructs you that the oc-

casions were privileged and that if the words were uttered without actual malice (if, in fact, there were any words said), then your verdict must be in favor of defendant and against the plaintiff.'

"To which refusal to give said requested instruction the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

IX. (R. 31)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 18, reading as follows:

"'If a remark, although not in fact substantiated in truth, is made in good faith and in an honest belief that it is true and without any desire or disposition to injure the party of whom it is spoken and without any spite or ill will toward him, then it is not malicious, and if the occasion is privileged, there is no liability.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XI. (R. 32)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 20, reading as follows:

"'In determining whether or not a communication to a person interested therein by one who is also interested is made without malice, malice is not to be inferred from the mere fact of communication.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XV. (R. 35)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 24, reading as follows:

> " 'If an employee of the defendant was sent out by the defendant to interview customers on the plaintiff's route for the purpose of checking up to ascertain what sales the plaintiff had made and what moneys he had collected, if any, then even if you should find that while engaged in that task such employee made the remarks referred to in the complaint to a customer, I instruct you that if the employee acted in good faith and in an honest belief that what he said was true and without any desire or disposition to injure the plaintiff and without any spite or ill will toward him, the remarks were privileged, and even if they were false and derogatory, the defendant cannot be held guilty of slander, and the plaintiff is not entitled to recover damages because of such remarks.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

Defendant's Proposed Instruction No. 20, quoted in Assignment of Error No. XI supra, follows the language of *California Civil Code,* Section 48. Defendant's Proposed Instruction No. 18 quoted in Assignment of Error No. IX is based on the language of *Davis v. Hearst,* 160 Cal. 143; 116 Pac. 530. The correctness of the instructions quoted in these Assignments of Error is shown by the discussion on pages 26, 38, 39, supra.

**9. The Court erred in giving certain instructions**

Not only did the court refuse to give *any* instructions on privilege requested by defendant, but on the contrary it did give the plaintiff's requested instructions Nos. 10 and 11, which

charged the jury directly to the contrary of the law as set forth in our Proposed Instruction No. 20.

Our Assignments of Error on the subject are:

VI. (R. 27)

"The Court erred in giving to the jury, during the course of the charge to the jury, the following instruction, which was Plaintiff's Requested Instruction No. 10, to wit:

" 'I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that the natural consequences of the publication complained of was to defame and injure plaintiff in his reputation and character you may properly infer such was the intention of defendant.'

"To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

* * * * * * *

" '(b) The present is a case of qualified privilege (see defendant's Proposed Instructions Nos. 17, 21, 24, 25 and authorities there cited). In such a case malice must be proved, and there is no presumption of intention or malice inferred (Civil Code, Section 48).

* * * * * * *

and then and there excepted to said instruction."

VII. (R. 28)

"The court erred in giving to the jury, during the course of the charge to the jury, the following instruction which was Plaintiff's Requested Instruction No. 11, to wit:

" 'In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slanderer is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint alleging slander you will de-

termine from all the facts and circumstances proved what damages are to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage.'

"To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

"'(a) Defendant objects on all the grounds stated in the objection to Plaintiff's Requested Instruction No. 10. * * * and then and there excepted to said instruction'."

These instructions were of course error, to the extent that they charge that a man is presumed to intend the consequences of his act and that therefore if the utterance was defamatory defendant was presumed to have intended to defame and injure plaintiff. The court thereby charged that malice was to be inferred from the mere saying of the words. We have already referred to *Civil Code,* Section 48, and to several other authorities, that the malice with which the law is concerned in cases of privilege is actual malice, which may not be so presumed (pp. 37, 38, supra).

*Davis v. Hearst,* 160 Cal. 143, refers to this same matter, and says (p. 166):

"The presumptions that an unlawful act was done with an unlawful intent and that a person intends the ordinary consequences of his voluntary act (Code Civ. Proc., sec. 1963) are, in libel, presumptions going to malice in law and not to malice in fact."

**10. Conclusion on Privilege.**

No matter how the subject is viewed, the trial court committed gross error. Its action can be explained only upon the assumption that it held that the present case did not involve a

privileged communication at all, and that the existence of actual malice was unnecessary to a recovery. Only if that is a correct view of the case may the judgment be affirmed.

We submit that the judgment should be reversed, with directions to enter judgment for defendant.

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## II.

## APPELLANT'S EMPLOYEES WERE NOT ACTING IN THE COURSE OR SCOPE OF THEIR EMPLOYMENT IN MAKING THE ALLEGED UTTERANCES.

### A. Assignments of Error Involved.

II. (R. 24)

"The Court erred in denying a motion made by the defendant at the close of all evidence for a directed verdict in favor of the defendant. The said motion was made as follows: 'I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground * * *

" 'And further, on the separate ground that there is no proof showing, or tending to show, that the persons who are alleged to have made the statements had authority so to do, or that they made the statements in the course of their employment, or that either of them made the statements under the authority of the defendant.'

"The Court denied said motion for a directed verdict, to which ruling defendant by its counsel then and there excepted."

III. (R. 25)

"The Court erred in denying the defendant's motion for judgment notwithstanding the verdict, said motion being made before judgment had been entered upon the verdict. The motion was as follows: 'I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated in support of my motion for a directed

verdict, to-wit, * * *; secondly, on the ground that any communications made were not made by the defendant or by anyone authorized by the defendant, and that no communication was made by anyone within the scope of his authority.'

"The Court denied said motion for judgment notwithstanding the verdict, to which ruling the defendant then and there excepted."

Other assignments of error (XX to XXIII, inclusive), having to do with the refusal by the court to give requested instructions on the subject of authority, are set out in preface to specific parts of the subsequent discussion (pp. 56, 58, 63, 64, 70).

Still others, Nos. XXVII to XXXIV (R. 45-50) XXXVI (R. 52), and XXXVIII to XLII (R. 53-56), have to do with admission in evidence of testimony of the utterances of Gould and Harbinson. The point of each assignment is the same; the authority of the employee being unestablished, remarks by him were not remarks of the defendant but pure hearsay. Since these assignments occupy several pages, they are set out in the Appendix, pages 1 to 8, but are discussed at pages 63 and 69 below.

### B. Summary of Argument.

**A corporation is liable for slander for remarks of an employee only if made in connection with the very same duty he was engaged in or instructed to do for his employer at the moment of the remark. Plaintiff seeks to hold Swift for remarks of Harbinson and Gould. Unless it is responsible for the remarks of both, a reversal is required. Harbinson was merely employed as a relief salesman; he had no authority to check the route because Mr. Everett, who supposedly told him to do so, was himself without authority in the premises. Gould had authority to check the route, but that did not include authority to make the remarks complained of. Consequently the remarks of neither Harbinson nor Gould are imputable to Swift.**

### C. Discussion of the Subject of Authority.

Swift is a corporation, and the plaintiff sought to hold it responsible for utterances made by an employee, Eugene Harbinson, and for similar remarks supposedly made by another employee, Charles P. Gould.

It was at one time generally held—and with considerable reason—that a corporation could not be held for slanderous utterances of an employee, particularly a non-officer, unless the corporation had expressly directed or authorized him to speak the words or had subsequently ratified them (10 *Fletcher on Corporations,* Perm. Ed., Sec. 4888, p. 402). This is still the minority rule (10 *Fletcher,* p. 413). It is the present majority rule that a corporation may be held for slander for remarks of an employee in the same circumstances in which it may be held for libel by him.

There seems to be no decision by the California courts on the subject of slander by a corporation, and there is consequently no rule of decision binding upon this court. We know that suits for defamation are regarded by the courts of this state without favor; that suits for slander are rare; and that suits against corporations for slander, if there have been any, appear never to have reached the appellate courts of this state. We nevertheless are prepared to proceed upon the assumption that the courts of California would follow the majority rule.

Even under that rule, it is clear beyond dispute that Swift can not be held responsible for any remarks of Eugene Harbinson, and we think that a sound analysis will demonstrate that it is likewise not responsible for any remarks of Charles P. Gould.

#### 1. Unless Swift is responsible for the remarks of both Harbinson and Gould, the judgment must be reversed.

If it be decided that Swift is responsible neither for the remarks of Harbinson nor the supposed remarks of Gould, the

case should be reversed with directions to enter a verdict for the appellant. If it be decided that Swift is responsible for remarks supposed to have been made by Gould but not for remarks made by Harbinson, the judgment must be reversed and the case at least remanded for a new trial. This consequence necessarily flows from the following facts.

Harbinson was a witness for the plaintiff. He testified that he made the remarks in question to several customers, and, save in the case of Lawrence Lewin of Larry's Groceteria, there was no conflict in this evidence. On the other hand, while three witnesses testified that Mr. Gould made certain remarks on two occasions, Gould himself testified for the defendant and denied that he made any such remarks. Gould was an individual of convincing personality. For all that appears the jury may have believed Gould, and it may have rested its verdict entirely upon remarks made by Harbinson as to which there was no conflict. The trial court was requested to instruct the jury that Swift could not be held responsible for any utterances of Harbinson. (See Assignment of Error No. XX, R. 39, discussed at pages 58 to 63, below.)

If this instruction had been given, the jury would have definitely been informed that it could return a verdict for the plaintiff only if it believed that Mr. Gould made some of the remarks in question. Since the emphasis of the plaintiff's case was upon remarks by Harbinson, and since Gould denied that he made any remarks, it is clear the case must be remanded for a new trial in event that requested instructions should have been given.

**2. Statement of the general principles governing liability of a corporation for slander for remarks of an employee.**

Accepting the majority rule of liability of a corporation for slanderous remarks of an employee, it is not enough that the remarks be made by an employee. They must be made by one

acting in the course and scope of his employment, and the test is a strict one.

Summing up the decisions on the subject generally, the principle may be stated thus: The fact that an employee, at the time he makes a derogatory statement about another, happens to be engaged in some service for his employer, is not enough to make his employer responsible for such remarks. In order to charge the employer, the remarks must be made in connection with the very duty in which the employee was employed to do or which he was instructed to perform for his employer at that time. In other words, the employee must have been engaged or assigned by his employer to act upon or in relation to the very subject matter with which the remark is connected at the very time the remark is made. *Washington Gas Light Co. v. Lansden,* 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. 296; *International Text Book Company v. Heartt,* 136 Fed. 129 (C.C.A. 4th); *O'Brien v. B. L. M. Bates Corporation,* 208 N. Y. S. 110, 211 App. Div. 743; *Vowles v. Yakish,* 179 N. W. 117, 191 Iowa 368.

**3. A mere truck route salesman of Swift would have been without authority to utter the remarks complained of.**

**(a) Assignment of Error:**

XXIII. (R. 41)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 16, reading as follows:

" 'If you find that some employee of the defendant uttered the alleged derogatory remarks concerning the plaintiff, that is not enough to make defendant responsible. If the employee who made such remarks was a salesman on a route, that fact would not by itself authorize him to speak for the defendant on the subject of the plaintiff and would not make the defendant responsible for any such remarks concerning the plaintiff,

and if the employee did make such remarks in the circumstances described, they are his own responsibility.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

(b) Discussion.

It requires no minute analysis to show that if a truck driver or salesman for Swift, engaged in making his rounds selling goods, and without any further duty, had made the remarks in question to its customers, Swift could not be held liable because such remarks would be unconnected with the employment of the driver or salesman. A few citations will suffice at this point.

In *First Texas Prudential Ins. Co. v. Moreland,* 55 S. W. (2d) 616 (Tex. Civ. App.) it was held that a mere salesman has no authority to slander another agent, past or present. Moreland, an insurance agent, appeared to be short in his accounts and was discharged. An agent of the company made remarks to certain people of whom he was soliciting insurance, supposedly stating that Moreland had been discharged for crookedness. The court held the company not responsible for the remarks. It said: (P. 621).

"His [the agent's] work was to sell insurance, not to adjust controverted claims relating to insurance collected, or to pass upon the honesty of any other agent, past or present. If an agent selling insurance for appellant made the statement charged, it was without the scope of his authority to represent appellant, entirely outside of the duty he was to perform, and that being so, no liability against appellant resulted. Schulze v. Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580, 586."

*International Text-Book Co. v. Heartt,* 136 Fed. 129 (C.C.A. 4th). In this case the plaintiff had been one of the defendant's sales agents, and one Stearn was a district supervisor. Stearn,

the supervisor, charged the plaintiff with embezzlement, and the plaintiff sued the company for slander. It was held error not to give a directed verdict for the defendant. Stearn's agency for the company was conceded, but there was no evidence that the utterances were within the scope of this employment. The court said:

> " 'It may, then, be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else which he is not employed to do, the master cannot be said to do it by his servant, and therefore is not responsible for what he does.' " (P. 133)

*Kane v. Boston Mutual Life Insurance Co.,* 86 N. E. 302, 200 Mass. 265. An action for slander was instituted on the basis of an utterance by certain solicitors of the company concerning the plaintiff, who was another solicitor. There was an offer to prove the utterance but no offer to prove that what was said was said in the course of employment. The court held that the mere doing of acts could not authorize the inference that they were done in the course of employment and rejected the offer.

The trial court in the present case should therefore have given defendant's proposed instruction No. 16 quoted in Assignment of Error No. XXIII set out on page 56, supra.

**4. Swift is not responsible for any remarks of Harbinson.**

**(a) Assignment of Error:**

XX. (R. 39)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 33, reading as follows:

> " 'I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr.

Harbinson. The Court finds that the evidence does not establish that Mr. Harbinson, if he made any of the alleged utterances, was acting within the course or scope of his employment.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

(b) Discussion.

Eugene Harbinson, at the time he made the remarks in question, was acting as a relief truck driver and sausage salesman. If that was the entire scope of his authority—and we so contend,—the company clearly is not liable for the remarks he may have made about Gray, as we have just seen.

To escape this objection it is claimed by plaintiff that Harbinson acted in the further capacity of checking the route to ascertain Gray's collections for the previous Friday. As to this claim we say:

(1) Harbinson did not purport at the time in question to act for the company in checking the route.

(2) Even if he had purported to act for it in the premises, he had no such authority in fact.

(3) Even if he did in fact have the authority to act for Swift in checking Gray's collections, nevertheless his remarks concerning Gray may not be imputed to the corporation. The case would then be the same with respect to him as with respect to Gould.

We here confine our discussion principally to the second of the three points. As to the third, we refer to our discussion at pages 64 to 69 concerning Gould. As to the first, plaintiff's contention is based entirely on the claim that Mr. Everett, the assistant sales manager, had told Harbinson to check the route. There is here a sharp conflict in the evidence. Plaintiff's evidence is that

Gray gave his list to Mr. Everett and that Mr. Everett gave the list to Harbinson asking him to see the customers therein named to find out what they had paid Gray on the previous Friday. On the other hand, Mr. Everett denied that the list had been given to him by Gray, that he had ever seen it until shortly before trial, or that he had ever given any instructions to Harbinson or even discussed the subject with him. Similarly Gould testified that Gray had given the list directly to Harbinson on Saturday afternoon and had requested Harbinson to check the route on behalf of Gray. (See page 9, supra.) If the testimony of Everett and Gould is true, clearly Harbinson was not acting for Swift when he checked the route but was acting for Gray. If the trial court had given the instruction quoted in our assignment of error XXIII (See pp. 56 to 58, above), the jury would have been informed of the necessity of choosing between the stories of Harbinson and Gray, on the one hand, and of Everett and Gould on the other, and the verdict might then be accepted as resolving the conflict on this particular issue of fact in favor of the plaintiff. Since the instruction was not given, the jury may have believed Everett and Gould and yet supposed that Swift was liable for Harbinson's utterances merely because he was a salesman.

However, even if we accept the testimony of Harbinson and Gray upon this subject, the case is in no better position for the plaintiff. We thus come to the second of the three points.

Since whatever authority Harbinson may have had with respect to checking the route emanated from Mr. Everett and from no one else, Harbinson's authority was no greater than Everett's. Water can rise no higher than its source,—and Everett could confer upon Harbinson no greater authority than he himself had. It is not here necessary to consider how far an agent may delegate his authority to another. We may, for the argument, assume that Everett could delegate to Harbinson all the authority that Everett himself had. But even if Mr. Everett himself had personally checked the route and had personally made the re-

marks in question, the company could not be held responsible for them, *because Mr. Everett himself had no authority whatsoever in the premises.* The evidence on this phase of the case is clear and undisputed.

We have already pointed out on pages 15 and 16, supra, that Everett was only the Assistant Sales Manager, and that it was not within the jurisdiction of the Sales Department to check discrepancies with reference to accounts or collections; such matters fell entirely within the department of the auditor, Mr. Hartl. The company had given definite instructions to the sales department that when discrepancies or shortages occurred on a route, the sales department had nothing to do with the matter. Such matters were to be referred at once to the auditor's department, which immediately took charge. This is the undisputed testimony of Mr. Hartl, the auditor, Mr. Everett, the Assistant Sales Manager, and Mr. White, the General Manager of the company. Plaintiff offered no evidence to the contrary. There was no evidence at all that Mr. Everett had any authority in the premises or had ever previously exercised any authority in any like situation. It will be recalled that the cashier, Mr. Hamilton, on Monday morning reported the shortage to Mr. Hartl, and that Mr. Hartl instituted an investigation and check of the route through Mr. Gould. If Everett had authority, Mr. Hartl's investigation would have been a useless duplication of effort.

The mere fact that Harbinson (or even Everett) may have thought he was acting for the company or for its benefit does not create authority in him. In *International Text-Book Co. v. Heartt,* 136 Fed. 129 (C.C.A. 4th.), it is said:

> " 'It is not sufficient that the act showed that he did it with the intent to benefit or serve the master. It must be something done in attempting to do what the master has employed the servant to do.' "

Practical considerations of business management confirm the legal rule and drive us directly to the conclusion that the appel-

lant cannot be held for the remarks of Harbinson. A corporation of the size and complexity of Swift and Company must departmentalize its work or else its affairs will fall into confusion. If any employee or officer at random were permitted to institute an investigation of accounts and to instruct some minor employee or relief truck driver to interview customers on matters of delicacy, and if a corporation were to be held liable for careless remarks made by such youthful and inexperienced individuals, it would become impossible for a corporation to carry on the accounting phases of its business with any safety at all. Such matters must of necessity be left in the hands of the department which by training and experience is qualified to deal with it. If others, however well inclined, however well intentioned their motive, encroach upon the functions of the accounting department, they act beyond the scope of their authority.

As a matter of fact, we think that these considerations demonstrate with certainty that Mr. Everett did not in fact instruct Harbinson to check the route, and that Harbinson did so at the request and as the agent of Gray, his friend. But whatever be the fact, it still remains that if Harbinson did act on Mr. Everett's instructions he was not acting within the scope of his own authority or of any authority which Mr. Everett possessed.

In this connection reference may be had to the leading case of *Washington Gas Light Company v. Lansden,* 172 U. S. 534. There Leetch was the General Manager of the Washington Gas Light Company. A former manager, Lansden, had given testimony before a congressional committee concerning the cost of production of gas, and his testimony was unfavorable to the gas industry. A periodical devoted to the interests of gas producers wrote a letter to Leetch as Manager of the company, inquiring as to Lansden's motives. Leetch replied, stating that a year previous when Lansden was employed by the company he had given testimony inconsistent with his later statements. This reply was untrue and was held to be defamatory. Nevertheless, a judg-

ment based on a jury verdict in favor of Lansden and against the company was reversed by the United States Supreme Court because there was no evidence which would sustain the theory that Leetch acted in the course and scope of his authority. The court's discussion on the subject is excellent but too long to quote.

We submit that the trial court in the present case should have instructed the jury that Swift could not be responsible for any utterances made by Mr. Harbinson.

(c) Error in admission of testimony of utterances of Harbinson.

Assignments of Error Nos. XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII and XXXIV (R. 45-51) refer to admissions by the court of testimony of Eugene Harbinson concerning his conversations with customers. Assignments of Error Nos. XXXVI (R. 52) and XLII (R. 56) refer to admissions by the court of testimony of certain customers concerning conversations with Harbinson. The testimony of these conversations should have been excluded because the authority of Harbinson to make the remarks on behalf of the company was not established. In the absence of any such authority such remarks are pure hearsay. (See *Kane v. Boston Mutual Life Insurance Company,* 86 N. E. 302, 200 Mass. 265, and *First Texas Prudential Ins. Company v. Moreland,* 55 S. W.(2d) 616, discussed at pp. 57, 58, supra.) (Assignments quoted, Appendix, pp. 1-5, 7.)

**5. Swift is not responsible for any supposed utterances of Gould.**

(a) Assignments of Error:

XXI. (R. 39)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 34, reading as follows:

" 'I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Gould. The Court finds that the evidence does not establish that Mr. Gould, if he made any of the alleged utterances, was acting within the course or scope of his employment.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XXII. (R. 40)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 12, reading as follows:

" 'Even if you find that the alleged remarks were made by some employee of the defendant and further that the employee had been sent out by the defendant to check the plaintiff's route, that is, to ascertain what sales had been made and what moneys had been collected by the plaintiff, nevertheless it would not be part of the employee's duties nor connected with his assignment to utter the remarks complained of, and defendant cannot be held liable on account of such remarks.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

**(b) Discussion.**

The situation with respect to Charles P. Gould is somewhat different than with respect to Harbinson. Having been authorized by Mr. Hartl, the auditor, Gould unquestionably did have authority from Swift to check the route for the purpose of ascertaining what moneys had theretofore been collected by Gray. Even so, we submit that if Gould made any remarks disparaging of Gray, he was not acting within the course or scope of his

employment, and his remarks cannot be imputable to the corporation. It may be that some cases may be found which go so far as to indicate the contrary. But the far better rule is in our favor. Since there is no decision of the California courts bearing upon the subject matter, this court is free to apply what it deems to be the best exposition of the common law.

Gould's duties in the premises were merely to ascertain *what* the customers had paid Gray on previous collections. He had no duty to ascertain *the reason* for the shortage. He was authorized merely to take a list of numbers of missing tickets and to find the tickets which bore those numbers. That was the extent of his duty. (See statement of facts at page 16, supra.)

*Vowles v. Yakish,* 179 N. W. 117, 191 Iowa 368, is considered to be a leading case upon the subject of liability for slander of a corporation for remarks of an employee. There Vowles, the plaintiff, had suffered a fire loss and sought to collect from the fire insurance company. The insurance company had an adjuster, Yakish, investigate the matter to determine the amount of the loss. In the course of his negotiations with the plaintiff for an adjustment of the loss, Yakish accused Vowles of having caused the fire. Plaintiff Vowles sued the insurance company for slander. It was decided that Yakish was not acting within the course of his employment or the scope of his duties in making any such remark. Yakish's only duty was to ascertain the *amount* of the loss, *not the reason for it.*

We quote from the court's opinion at length: (P. 119)

> "The real question here to be determined is: Was the defendant, at the time he uttered the words complained of, acting within the scope of his employment, and in the actual performance of his duties touching the subject-matter of the negotiations or transaction. The mere fact that the defendant Yakish was at the time the agent of the insurance company to adjust the loss, and that the defamatory words were used during the negotiations, does not establish liability on the part thereof. [Citation]

"* * * It is, however, manifest from the purpose of the agency that Yakish had authority to adjust and agree upon a settlement of the loss that would be binding upon the company. This is conceded, but is it sufficient to establish liability? * * *

"It will be observed from the foregoing statement that the subject-matter of the negotiations was the extent of the loss, and not the origin of the fire. The latter question does not appear to have entered into the controversy at all. * * * Authority to adjust and settle the loss was all that the business in hand required. * * *

"* * * It is, of course, true that the offensive language was used during the negotiations for a settlement, but, unless they were used within the scope of the agent's employment and while in the actual performance of his duties touching the matter in question, the defendant company is not liable therefor. * * *

"* * * While it is true the meeting of the parties to adjust the loss provided the occasion for the utterance of the slander, we see no more reason for holding that Yakish was acting within the apparent scope of his employment, when he accused the plaintiff of setting fire to his building and stock of groceries, than was the manager of the telephone company when he attempted, by the use of violence, to compel an employee to sign the voucher. We think it manifest that in doing so he was not acting within the scope of his employment. Corporations can only transact business through agents, and, in the absence of some testimony in the case at bar tending to show that the defendant company questioned its liability upon the ground that plaintiff set fire to his building or stock, or that Yakish was authorized and engaged in the investigation of the origin of a fire, or that its origin was in some way involved in the subject-matter of the negotiations, there is nothing to support an inference that at the time the objectionable language was used he was acting within the scope of his employment or authority as the agent of the defendant corporation."

*O'Brien v. B. L. M. Bates Corporation,* 208 N. Y. S. 110 (211 App. Div. 743). This was an action for slander against the Hotel Belmont, based upon slanderous epithets of the hotel's Assistant Manager, made while he was ejecting the plaintiff from one of the hotel rooms. The assistant manager had authority to make investigation to see if there was improper conduct in any of the rooms and, if he found such conduct, to remove the guilty parties. The court held that when the assistant manager not only ordered the plaintiff from the rooms but in addition applied the slanderous epithets, he was going outside the scope of his employment. His act constituted an independent one, not in anywise within or forming any part of the action called for in the performance of his duty.

The court approved the following statement by Lord Chancellor Loreburn in *Glasgow Corporation v. Lorimer,* 1911, App. Cas. 209:

> " 'I do not think it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. *The question is whether or not there is any authority to communicate on behalf of the corporation any comment or statement of opinion at all.*' "

It also approved the statement of Lord Shaw of Dunfermline in the same case:

> " '* * * It is perfectly true that it was part of Gilmour's duty to look at the receipts given for payments formerly made; but I entirely agree with my noble and learned friends who have preceded me that it was no part of his duty to express his own opinion as to the genuineness of such documents. * * * *If, however, it were to be held that persons in the ordinary and comparatively humble position of this officer were within the scope of their employment in expressing opinions as to the conduct of those with whom they have dealings in the course of doing their work, the consequences might be of the most serious character, and the essential justice which underlies the maxim qui facit per alium facit*

> *per se would disappear.* In my opinion that maxim does not apply; and responsibility for the servant's alleged slander does not attach to the employer.' "

The remarks of Lord Shaw of Dunfermline are most appropriate. If employees in the comparatively humble positions of Gould and Harbinson are within the scope of their employment in expressing opinions as to the conduct of another employee, Gray, when their task was merely to sell goods, or at the most to ask for and to look at the customers' sales tags, the essential justice in the doctrine of respondeat superior has indeed disappeared and the conduct of business is seriously impaired.

The court, in the *O'Brien* case, also approved the following statement in *Duquesne Distributing Company v. Greenbaum,* 121 S. W. 1026, 135 Ky. 182, itself a leading case:

> " 'Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement, and more frequently than otherwise are the voluntary thought and act of the speaker. Or, to put it in another way, the words spoken are not generally prompted by or put into the mouth of the speaker by any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service, it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be. It would be entirely out of the question to hold the principal or master responsible for every reckless, thoughtless, or even deliberate speech made by his agent or servant concerning or relating to persons that the agent or servant may meet, or know, or come in contact with while in the service of his principal or master.' "

*Sawyer v. Norfolk & S. R. Co.,* 54 S. E. 793, 142 N. C. 1. There the plaintiff Sawyer called upon the superintendent of the

defendant railroad company to apply for a job. He was refused the position, and the superintendent then accused him of various dishonest acts. The plaintiff sued the defendant corporation for slander. It was held that there was no liability. Even though the superintendent had full authority to employ or reject the plaintiff, it was held that he went beyond the scope of his employment when he proceeded to insult and defame the plaintiff in the course of rejecting the application. And so, in the present case, Gould had authority to check for missing tickets, but he went beyond his authority or any fair incident of it, if he made disparaging remarks about Gray. His task was to find the shortage, not to ascertain the cause of the shortage.

(c) Errors in admission of testimony of utterances of Gould.

Assignments of Error Nos. XXXVIII, XXXIX, XL and XLI (R. 52-55, Appendix, pp. 6, 7) have to do with admissions by the court of testimony of customers concerning purported conversations with Mr. Gould during the course of which Mr. Gould is supposed to have made some of the allegedly slanderous remarks. Since the authority of Gould to act on behalf of the corporation in the premises was not established, it was error to admit this testimony. (See authorities cited on pages 57, 58, supra.)

**6. The Court should have granted a nonsuit, directed a verdict, or entered judgment for defendant notwithstanding the verdict.**

If Gould was acting beyond the scope of his authority in making any of the alleged remarks, *a fortiori* Harbinson was acting beyond the scope of his authority. We therefore submit that the trial court erred in refusing to direct a verdict for the defendant (Assignment of Error No. II, R. 24, p. 52, above), and it likewise erred in denying defendant's motion for judgment (Assignment of Error No. III, R. 25, p. 52, above).

**7. Further errors with respect to authority.**

In conclusion it may be added that the court erred as stated in Assignment of Error No. XXII-A (R. 41):

> "The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 14, reading as follows:
>
> " 'The law does not hold an employer liable for every defamatory utterance of an employee. It does not hold an employer responsible for every reckless, thoughtless or even deliberate speech made by an employee concerning or relating to other persons while he is in his employer's service.'
>
> "To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

The language of this instruction is derived from *Duquesne Distributing Company v. Greenbaum,* 121 S. W. 1026, 135 Ky. 182, quoted supra. In view of the history of the law concerning the liability of a corporation for slander, the strictness with which the courts require the authority of the employee to be proved, the evil which may flow from holding a corporation for the careless or thoughtless remarks of employees and the essential injustice of requiring Swift to apply a money poultice to assuage the feelings of Gray for wounds inflicted by his own friends, one of whom was his chief witness, the jury ought to have been instructed upon the subject with an explicitness defying ambiguity.

## III.

### THE PLAINTIFF AND APPELLEE GRAY IS IMPALED ON THE HORNS OF A DILEMMA BETWEEN PRIVILEGE AND AUTHORITY

For the reasons already stated we think it clear both that the words uttered were protected by the doctrine of privilege, and also that those who uttered them acted beyond the course and scope of their employment. Moreover, if both defenses are not applicable, one of the two must be. The plaintiff is on the horns of a dilemma. If the statements complained of are so connected with the task of checking the route as to be within the course and scope of the duties of the employees, they were then such a natural part of the task as to be protected by the privilege. On the other hand if they were so disconnected with the task of checking the route as to fall outside the protection of the privilege, they certainly were beyond the course and scope of the employment.

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## IV.

### THE WORDS UTTERED AND SUPPOSED TO HAVE BEEN UTTERED BY HARBINSON AND GOULD ARE BOTH TRUE AND, AS A MATTER OF LAW, NONDEFAMATORY.

#### A. Assignments of Error.

XXIV. (R. 42)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendants' Proposed Instruction No. 5, reading as follows:

'The meaning of the language used in an alleged defamatory publication is in the first instance a question for the Court to decide. Where language is unambiguous, it is the province of the Court to determine its construction and determine whether it is capable of the defamatory meaning which the plaintiff claims for it. The plaintiff claims that the defendant said of him that

"Harry (meaning the plaintiff) is short in his accounts with the company." The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander and you cannot render a verdict against the defendant on account of those words.'

To which refusal to give said requested instruction the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XXV. (R. 43)

"The Court erred in refusing to give to the jury the following instruction requested by the Defendant and referred to as Defendant's Proposed Instruction No. 6, reading as follows:

'The plaintiff claims that the defendant said of him that "He (meaning the plaintiff) has collected money of the company and has not turned it in." The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words.'

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

## B. Discussion.

**1. Unless words are ambiguous, it is for the court to decide whether they are defamatory. Their meaning cannot be enlarged by the innuendo of the complaint.**

The meaning of the language used in alleged defamatory publications is in the first instance a question for the court. If the language is not ambiguous, it is for the court to decide whether it is defamatory. The innuendo of a complaint cannot add to or vary the meaning of the words or make defamatory what is not defamatory.

16 *Cal. Jur.* 121; *Mellen v. Times-Mirror Co.* 167 Cal. 587, 140 Pac. 277; *Jackson v. Underwriters Report, Inc.* 21 Cal. App.(2d) 591, 69 Pac.(2d) 878; *Grand v. Dreyfus,* 122 Cal. 58, at 61, 54 Pac. 389; *des Granges v. Crall,* 27 Cal. App. 313 at 315, 149 Pac. 777; *Chavez v. Times-Mirror Co.,* 185 Cal. 20 at 25, 195 Pac. 666.

We quote from the *Jackson* case, supra, in the Appendix, at pages 8, 9 for illustrative purposes.

**2. There is in this case a definite variance between the allegations of the complaint and the proof.**

The complaint alleges that the defendant spoke of the plaintiff (R. 2):

> "Harry is short in his accounts with the company. He has been taking the company's money. He has collected money of the company and has not turned it in."

The complaint adds the innuendo that these words meant that the plaintiff had been guilty of embezzling funds of the defendant. As just noted, the innuendo can add nothing, since the words are clearly not ambiguous. It will be seen that there are three distinct sentences in the passage of which complaint is made: (1) "Harry is short in his accounts with the com-

pany." (2) "He has been taking the company's money." (3) "He has collected money of the company and has not turned it in."

*The proof shows that the words charged were not spoken to anybody as a single whole, and so each sentence must be construed of itself.* There was evidence of utterances to eleven people. Harbinson spoke to eight, and Gould supposedly to three. (See pp. 10-12, 17-18, supra.) To three of the eight, Harbinson said merely that Gray was short in his accounts (p. 12, supra). To two of the three to whom Gould supposedly spoke, plaintiff's evidence is that Gould only said that Gray was short in his accounts (p. 17, supra). Thus to five of the eleven people, this was the only remark claimed to have been made.

To his remarks to five people, Harbinson, according to his testimony, added the words: "as (or 'and') he had not turned in the money to the company that he had collected." (p. 12 supra). Of these five, one (Lawrence Lewin) testified and denied that any remark at all had been made to him about Gray. (pp. 12, 13, supra).

To no one at all was it said by anyone that Gray had taken money belonging to the company. There were only two persons with respect to whom there was any testimony of any statement even resembling such a remark, and in each instance the testimony sharply conflicts with other evidence. We discuss this phase of the case at pages 77 to 79, below.

Now, the court was requested by the defendant to charge the jury that the utterances "Harry is short in his accounts with the company" and "he has collected money of the company and has not turned it in" were not defamatory. (See Assignments of Error Nos. XXIV and XXV). If the jury had been so charged and had still returned a verdict for the plaintiff, it might be assumed that it had resolved the conflict and had decided, although upon very tenuous evidence indeed, that Harbinson or Gould had in fact said of Gray that he had

taken money belonging to the company. But the jury was not so charged and was left to assume that on the mere basis of the undisputed utterance of Harbinson that Gray was short, it could find for the plaintiff.

Consequently, a reversal must follow, if the statements that Gray was short is true, or if it is as a matter of law non-defamatory. The same is true with respect to the statement "he has collected money of the company and has not turned it in." (See *Christal v. Craig,* 80 Mo. 367, from which we quote a passage precisely in point, in the Appendix at page 9.)

**3. The statement "Harry is short in his accounts with the company" is both true and as a matter of law not defamatory.**

The statement that Gray was short in his accounts was an objective designation, a description of a state of affairs containing no element of criminal imputation. It indicated merely that goods belonging to Swift had been checked out to the salesman and had been sold by him, that the purchase price had been received by him, and that there had not been a full accounting to the company. We refer to the Statement of Facts, pages 4-9, 19-20, supra, and here briefly summarize. Gray himself testified that the sales tags were charged to him and in turn credited only when they came back (R. 111). Until they came back to the person designated to receive them, he was "short." It was a conceded fact and Gray himself realized that he remained responsible for moneys collected by him even though those moneys had been lost through no wrong or even through no fault of his, and the term "shortage" was first used in this case to describe the situation by Gray himself (pp. 7-9, supra).

Whether Gray was short through carelessness or misfortune, or because someone else had stolen the moneys, he nevertheless was short. He admitted that the officers of the company had

never claimed that he had stolen any money but merely that he was "short"; .ie., his account did not balance. Those officers testified that it was not a question of whether he took the money but that they had not received it and an employee was not relieved of responsibility until he had turned it in.

That there was a shortage is therefore true.

Moreover, as a matter of law the statement that Gray was short in his accounts, whether true or false, is not defamatory. It is an unambiguous statement; it means a lack of accounting balance; it contains no imputation of wrongdoing. This was clearly the understanding of plaintiff's own witnesses, Mr. Harbinson and Mr. Montemagni, as shown by their testimony which is fully discussed in the Statement of Facts, pages 13 to 15, supra.

The authorities confirm us:

*Pittsburgh A. & M. Railway Co. v. McCurdy,* 8 Atl. 230, 114 Penn. St. Rep. 554. We discuss and quote at length from this case in the Appendix, pp. 9-11. It is approved by Judge Leon R. Yankwich in his *"Essays in the Law of Libel,"* p. 26.

*Hoffland v. Journal Company,* 60 N. W. 263, 88 Wisc. 369. This case involves the term "shortage", and we quote from it in the Appendix, pp. 11, 12.

*Ferguson v. Houston Press Co.,* 1 S. W.(2d) 387, (Tex. Civ. App.). This also involves the term "short". (See Appendix, p. 12.)

See also, *McLaughlin v. Standard Accident Insurance Company,* 15 Cal. App.(2d) 558, 59 Pac.(2d) 631; *First Texas Prudential Insurance Co. v. Moreland,* 55 S. W.(2d) 616 (Tex. Civ. App.); *Missouri etc. R. R. Co. v. Moses,* 144 S. W. 1037 (Tex. Civ. App.); *Christal v. Craig,* 80 Mo. 367.

**4. The statement "He has collected money and has not turned it in" is both true and, as a matter of law, not defamatory.**

The further statement, "he has collected money of the company and has not turned it in" is likewise both true and as a matter of law not defamatory. Little need be added to what we have already said. The money had not in fact been turned into the company because it had not been received by the department to which an accounting should have been made. Moreover, the statement was not defamatory because it did not imply criminality or dishonesty. The failure to turn the money in "might have resulted from mere neglect or inefficiency, or from mere mistake or accident." *Pittsburgh A. & M. Railway v. McCurdy,* supra.

**5. The further utterance supposedly made was nondefamatory.**

The further utterance charged in the complaint is the statement "He has been taking the company's money."

There is not one word of evidence that this statement was ever uttered to anybody. There is the testimony of one witness, Fred Langbehn (p. 18, supra), denied by Gould (p. 18, supra), that a statement was made by Gould, "it seemed Harry Gray had taken some of Swift's money." There is the testimony of another witness, Emmett Arjo, (p. 13, supra)—in conflict with the testimony of plaintiff's own witness Harbinson (pp. 12, 15, supra)—that Harbinson on one occasion said "Mr. Gray had been accused of taking money from Swift *and he was checking up to see how much he paid him."**

We submit that statements such as these are not defamatory, even if made. In the first place, words must be construed as a

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*It is hardly credible that any one in fact has said that Gray had taken money belonging to Swift, for no one ever entertained that thought concerning him. Statement of Facts, pp. 19, 20, supra.)

whole *in the entire context of both words and circumstances* in which they occur. *Townshend on Slander and Libel,* 4th Ed. pp. 120, 121, Sec. 134 (quoted in Appendix, p. 12); *Townshend.* Sec. 137; *Stevens v. Storke,* 191 Cal. 329, 334, 216 Pac. 371; *Van Vactor v. Walkup,* 46 Cal. 124.

Where one portion of a statement is offset by the remainder, under the doctrine of *"the bane and the antidote"* it is nondefamatory. See *Judge Leon R. Yankwich, Essays in the Law of Libel,* pp. 29, 30. We quote from Judge Yankwich, in the Appendix, p. 15.

In the present case, the statement, if made, that Gray had been accused of taking money *was coupled with the further statement that for that reason Swift was checking up. Not only was the reason stated in words but the check or investigation was the very circumstance in which the utterance was placed.* It thus appeared that Swift was making no accusations but was reserving judgment or opinion until it had an opportunity of ascertaining the facts. Consequently, if there was any bane in the statement, it was coupled with its antidote. The listener who would assume from the alleged statement that Gray had embezzled money would himself have been guilty of a gratuitous assumption made in the face of express information that Swift did not know but was trying to find the facts. *Ferguson v. Houston Press Co.,* 1 S. W.(2d) 387, and *Hoffland v. Journal Co.,* 60 N. W. 263, 88 Wisc. 369, reviewed at page 11 of the Appendix, are directly in point. And see *Browne v. Prudden-Winslow Co.,* 186 N. Y. Supp. 350, 195 App. Div. 419 (Appendix, p. 15). See also, Appendix, pp. 14, 15.

There is still a further reason why we think the alleged words were not defamatory. As Judge Yankwich says (*Essays in the Law of Libel,* p. 44), "Where words are alleged to be libelous as charging a crime, a criminal offense must be specifically imputed," and this requires a specific imputation of the essential elements of the offense (although the precision of an indict-

ment is not necessary), including the necessary criminal intent. It has therefore been held that the word "take" cannot by innuendo be construed to mean "steal." *Grand v. Dreyfus,* 122 Cal. 58, 54 Pac. 389; *Christal v. Craig,* 80 Mo. 367.

Judge Yankwich's *"Essays in the Law of Libel"* contains an excellent discussion of this subject, and we quote from it in our Appendix, pages 12 to 14.

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## V.

**EVIDENCE WAS ERRONEOUSLY ADMITTED CONCERNING EFFORTS OF THE PLAINTIFF TO FIND EMPLOYMENT.**

Due to lack of space under Rule 24(e) we are placing our discussion of the present matter in the Appendix, pages 15 to 24.

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## CONCLUSION

It is respectfully submitted, upon the independent basis of each of the four grounds stated at pages 3 and 4, supra, that judgment should be reversed with direction to enter judgment for the defendant.

Dated: San Francisco, California, July 29, 1938.

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MAURICE E. HARRISON,
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# Appendix

## I.

### ADDITIONAL ASSIGNMENTS OF ERROR CONCERNING LACK OF AUTHORITY OF EMPLOYEES OF SWIFT TO MAKE THE REMARKS COMPLAINED OF BY THE PLAINTIFF.

On pages 53, 63 and 69 of the brief, assignments of error are discussed and referred to as set out in the Appendix. They are as follows:

XXVII. (R. 45)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between the proprietor of the Los Angeles Fruit Market in Burlingame and the witness, as follows:

'Q. Will you just give us the conversation you had with the lady who owned the Los Angeles Fruit Market?

'Mr. Harrison: That is objected to on the ground that it is hearsay, not binding upon this defendant.

'The Court: What is the purpose, Mr. Van Dyke?

'Mr. Van Dyke: To prove the slander.

'Mr. Harrison: We submit it does not show any authority in this witness, so the words spoken by him would not be within the scope of his authority to bind the company.

'The Court: Objection overruled.

'Mr. Harrison: Exception.

'The Court: Yes, exception noted.

'A. I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. After some discussion as to why she wouldn't let me see it, I told her that Mr. Gray was short in his accounts with the company; that I wanted to find out how much she had paid Mr. Gray on Friday.' "

XVIII. (R. 46)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Monte's Meat Market in San Mateo and the witness as follows:

'Q. Now, will you please give the conversation you had with the man at Monte's Market that you called Al?

'Mr. Harrison: Object to that, if the Court please, on the ground that it is irrelevant, incompetent, and immaterial, and hearsay and not authorized by the defendant.

'The Court: Overruled.

'Mr. Harrison: Exception.

'A. I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said he did not have it with him, and he wanted to know why, and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid.' "

XXIX. (R. 46)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one Lawrence Lewin (known to the witness as 'Larry') and the witness, as follows:

'Q. Now, give us the conversation with Larry?

'Mr. Harrison: Same objection already stated, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant.)

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'A. I said that I wanted to see the sales tag Mr. Gray had given him on Friday. There was some discussion as to why I wanted to see it, and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money.' "

XXX. (R. 47)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between the proprietor of Economy Market in Menlo Park (referred to as 'Carl') and the witness as follows:

'Q. Now, when you went there, what occurred there, what conversation took place with Carl?

'Mr. Harrison: The same objection, if the Court please,—irrevelant, incompetent, and immaterial, and hearsay.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I wanted to see his sales tag that Mr. Gray had given him on Friday, and we had some discussion as to why I wanted to see it, and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, "No," that I was checking Mr. Gray's route, that he was short in his accounts and had not turned any money in.' "

XXXI. (R. 48)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one referred to as 'Joe' and the witness, as follows:

'Q. What conversation took place between yourself and Joe?

'Mr. Harrison: My objection may be deemed interposed to that conversation, may it, your Honor (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant)?

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray.' "

XXXII. (R. 49)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one Mrs. Lightner and the witness, as follows:

'Q. Will you give us that conversation with Mrs. Lightner, please?

'Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and Company.'"

XXXIII. (R. 49)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Arjo's Market at Mayfield and the witness, as follows:

'Q. And give us the substance of that conversation with Arjo?

'Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, "Why, yes," and he came back and wanted to know why I wanted to look at it, and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare the prices, and I said no. I said Gray was short in his accounts and had not turned the money in to Swift and Company and I wanted to find out the amount.'"

## XXXIV. (R. 50)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of another market in Mayfield and the witness, as follows:

'Q. Give us the substance of the conversation that you had there in the market in Mayfield?

'Mr. Harrison: Same objection as heretofore interposed, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I told him that I wanted to see the sales tag that Mr. Gray had given him on Friday, and he objected to that. So I told him that Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company.' "

## XXXVI. (R. 52)

"The Court erred in permitting the plaintiff's witness Emmett Arjo to testify over the objection and exception of the defendant concerning a conversation between Eugene Harbinson and the witness, as follows:

'Q. What was the conversation?

'Mr. Harrison: Object to that if the court please on the ground that it is hearsay, incompetent, irrelevant, and immaterial.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) Mr. Harbinson asked to see my sales tag. I asked the reason for it and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him. I relied, "I'm sorry; I had no cash dealings with Mr. Gray," that I had a weekly account.' "

XXXVIII. (R. 53)

"The Court erred in permitting the plaintiff's witness Fred Langbehn to testify, over the objection and exception of the defendant, concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Just state what was said?

'Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken. Nothing more was said. When we arrived at the house, Mrs. Allen got out the bills, and Gould checked the bills we had there with the list he had in his little book. He checked the amounts and the bills with the totals in the books.' "

XXXIX. (R. 54)

"The Court erred in permitting the plaintiff's witness Fred Langbehn to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Did he make any other statements while he was going through the slips with reference to Mr. Gray?

'A. Yes, he said——

'Mr. Harrison: Same objection, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'A. He said it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing.' "

XL. (R. 55)

"The Court erred in permitting the plaintiff's witness Polly Guptill to testify over the objection and exception of

the defendant concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Just go on from there. What did he say?

'Mr. Harrison: In order that the record may be clear, we object, if the Court please, on the ground that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) Mr. Gould asked to look over the receipts. I asked him why. He answered that the reason was that he was sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips.' "

XLI. (R. 55)

"The Court erred in permitting the plaintiff's witness Dorothy Hamilton Kipps to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Just state what was said.

'Mr. Harrison: Same objection as already stated in the case of the last witness (that it is immaterial, irrelevant, and incompetent, and no authority proved; hearsay).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) Mr. Gould came in and asked to look over the accounts, saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift. He stated that it was Harry Gray's accounts that were short.' "

XLII. (R. 56)

"The Court erred in permitting the plaintiff's witness Arnold Montemagni to testify over the objection and exception of the defendant concerning a conversation between Mr. Harbinson and the witness, as follows:

'Q. Did you have any conversation with Mr. Harbinson in October of 1934 concerning Mr. Gray?

'Mr. Harrison: That is objected to on the ground that is already stated with respect to the last witness

(that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay).

'The Court: Overruled. Exception noted.

'Mr. Harrison: Exception.

'(Witness) About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. He told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it.' "

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## II.

### FURTHER DISCUSSION OF AUTHORITIES REFERRED TO IN PART IV OF THE BRIEF.

**A. The meaning of unambiguous words is for the court.**

At page 73 of the foregoing brief we refer to *Jackson v. Underwriters Report Inc.,* 21 Cal. App.(2d) 591, 69 Pac.(2d) 878. The court there stated the following rule:

> "It is well settled, however, that where the words complained of are neither ambiguous nor used in any covert sense, it is for the court to determine in the light of such extrinsic facts as are alleged whether the words are susceptible of the defamatory meaning sought to be attributed to them; and if they are not, then neither inducement nor innuendo can make them a libel by ascribing a meaning to the published words other or broader than the words themselves naturally bear." (p. 597.)

In that case in the course of an article which stated of several fire insurance claimants that they had fraudulently started a fire, reference was had to the plaintiff, Max Jackson, who was the appraiser. The reference said:

> "Appraiser had fire loss also. On cross-examination of the appraiser appointed by the insured, it was revealed that he, the appraiser, whose name is Max Jackson, had

had losses in which he had collected over $40,000 from insurance companies and that after one of his losses he left the country for a period of time." (p. 595.)

The court held that these words "are unambiguous and used in their ordinary sense and could not bear any defamatory innuendo" and held a nonsuit proper.

**B. A reversal must follow if defendant's proposed Instructions 5 and 6 or either should have been given.**

On page 75 reference is had to *Christal v. Craig,* 80 Mo. 367. In that case the court had to do with a joinder in the complaint of several different utterances of which some did not furnish a good basis for an action of slander. The court said:

> "On principal it must obtain that where the several causes of action are united in one count, and the case is tried on all, and a simple verdict and assessment of damages in favor of the plaintiff, if one or more of the causes of action assigned be bad, so as not to support the verdict, the verdict must be bad as to all. How is it possible for the court to tell whether the jury took one or all the alleged slanderous words into their estimation? How much proof of the imperfect cause, and how much on the good, did the jury consider? Was it the fact proved touching the bad count that influenced the verdict, and if so, to what extent? Would the jury have given any damages of moment on account of the words properly alleged in the petition, without proof of the others?" (pp. 371, 372.)

**C. The statement "Harry is short in his accounts with the company." is non-defamatory.**

On page 76 of the brief reference is had to *Pittsburgh A. & M. Railway Company v. McCurdy,* 8 Atl. 230, 114 Penn. St. Rep. 554. In that case McCurdy, a discharged conductor, had claimed the right to ride on the company's cars on an employee's

ticket after his discharge. The company thereupon posted a notice stating:

> "H. B. McCurdy has been discharged for failing to ring up the fares collected. Discharged employees are not allowed to ride on employees' tickets."

McCurdy thereupon sued for libel, alleging that the published matter charged him with embezzlement. The court held that as a matter of law the words had no such meaning. Pointing out that it was the duty of a conductor to ring up, i. e., to register, all fares received, it said:

> "Now, the company had a clear right to insist upon the full performance of this duty. It was for many reasons, perhaps, important that it should be faithfully and promptly performed and the company, apart from any anticipated fraud, might well annex the penalty of a dismissal from service for neglect of this duty. But *a failure to perform the duty required might result from mere neglect or inefficiency, or from motives of dishonesty. 'Failure to ring up all the fares collected,' therefore, does not necessarily imply the fraud or dishonesty of the conductor. It does not import the commission of any crime.* Embezzlement is the fraudulent application by one of the money intrusted to his care by another; and, even if McCurdy did fail to ring up all the fares collected, non constat that he embezzled the money. * * *
>
> "Words, it is true, are not to be construed *in mitiori sensu.* It is sufficient if, in their plain or popular meaning, they are libelous; but when they do not in themselves convey the meaning imputed to them in the innuendo, or where they are ambiguous or equivocal, there must be not only in the pleadings, but also in the proofs, reference to some extrinsic matter which will show the sense in which it is claimed they were understood. *Stitzell v. Reynolds,* 59 Pa. St. 490. The plaintiff's default in not ringing up the fares, as we have said, might have resulted from his negligence or inefficiency, or from mere mistake or accident, or from his intentional fraud; *and, if people will draw from the general statement of his discharge on that ground a*

*merely possible inference of fraud and embezzlement, which the words themselves in their usual signification did not justify, it is certainly not the defendant's fault.*

"* * * the words here employed are not equivocal or ambiguous. *Apart from the unjustifiable inference which the witnesses have drawn,* they are not even alleged to be capable of any but one meaning, and there is absolutely no evidence, as against the railway company, that the words were used *in any other sense than that which in the business was ordinarily attached to them.* The question was therefore for the court to determine whether the words in that sense covered the crime of embezzlement, as charged in the indictment."

On page 76 of the brief reference is had to *Hoffland v. Journal Company,* 60 N. W. 263, 88 Wisc. 369. In that case there was an action for libel against a newspaper for publishing an article of the defendant, who was the ex-treasurer of the county:

"Spoiled a Sensation. An Alleged Shortage at West Superior. Settled by Bondsmen. West Superior, Wis., Feb. 6. A rather sensational feature was promised for the meeting of the county board this afternoon. It is alleged that there was a deficit of $2,500 in the accounts of Ex-Treasurer Dan Hoffland. The supervisors claimed that the books were short $2,500. It is claimed, however, for Mr. Hoffland, that this was for fees collected which belonged to the office, and not to the county. The matter was settled by the bondsmen before the meeting of the board."

The court said:

"The meaning of the words cannot be enlarged by innuendo. The publication is not actionable per se. It does not impute the crime of embezzlement. It is only, in effect, that there was a deficit in the plaintiff's accounts of $2,500, which he claimed were fees collected which did not belong to the county, but to the office; and this is not disputed in the publication. The matter was settled before it came before the board. There was no demand for the money, or for an accounting, or refusal to pay on demand,

charged. The language is far short of embezzlement, or of any other crime. The objection should have been sustained.

"2. The court directed a verdict for the defendant on the evidence, and did right in doing so."

On page 76 of the brief reference is had to *Ferguson v. Houston Press Co.,* 1 S. W.(2d) 387 (Tex. Civ. App.). This was an action for libel brought by the tax collector against a newspaper for publishing of him an article:

"Ferguson Short $1,600.
Criminal Intent not Found
Case therefore not Pressed Further.
Promises to Pay.
No Conspiracy against Him He Admits."

The court said:

"The imputation that an official is 'short', meaning without 'criminal intent,' is justified by the fact that he was inexcusably in arrears for some extended period of time in accounting for and paying over taxes collected, permitting employees to use same on duebills. Such official is legally bound to timely report and account for taxes collected, and untimely failure to do so constitutes delinquency in payment." (p. 391)

**D. The further utterance supposedly made was non-defamatory.**

On page 78 of the brief, reference is had to *Townshend on Slander and Libel,* 4th Ed. pp. 120, 121, Sec. 134. We quote:

"Whenever language charged to be defamatory has any reference to, or is connected with any other language or event, which affects its meaning or effect, it must be construed in relation to such other language or event, and this, although on the face of the alleged defamatory matter there is no reference to any other language or event."

On pages 78 and 79 of the brief we refer to Judge Leon R. Yankwich's *"Essays on the Law of Libel".* At pages 44 and 45 of that work the following appears:

"Where words are alleged to be libelous as charging a crime, a criminal offense must be specifically imputed.

"This does not mean, of course, that the alleged crime should be stated with the precision of an indictment.

"But a crime must be imputed therein, with such certainty as to the elements of the offense and the person to whom it is brought home, that on reading it, it can be said that a person certain is charged with a crime certain.

"In *Newell on Slander and Libel,*[3] it is said:

> " 'Where words are sought to be made actionable, as charging the party with the commission of a crime, a criminal offense must be specifically imputed. It will not be sufficient to prove words which only amount to an accusation of fraudulent, dishonest, vicious or immoral conduct, so long as it is not criminal; or of a mere intention to commit a crime, not evidenced by any overt act.'

"If an essential element of the offense is lacking in the written words they will not be held to be libelous *per se,* as charging that offense.

"The element will not be inferred merely from the fact that the words were used.

"Nor will an innuendo to the effect that the words were meant to charge or were understood to charge the offense, supply the deficiency.

"These principles are fully supported by the authorities.

"We give herewith a summary of the most important of them:

"To say of a person that he 'set his house on fire' does not charge *arson*[3a].

"That a library 'had been plundered by him' does not charge *larceny*[4].

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3. 4th Ed., Sec. 202.

3a. Frank v. Dunning, 38 Wis. 270; Bloss v. Tobey, 2 Pick. (Mass.) 320.

4. Carter v. Andrews, 16 Pick. (Mass.) 1.

"Speaking of a public official, that he 'sold out' does not charge *bribery*[5].

"That he was engaged in 'filibustering' does not charge *violation of neutrality*[6].

"That he 'presented forged instruments' does not charge *forgery*[7].

"To say that he had 'wantonly taken the life of an innocent child in violation of the law, does not charge *murder*[8].

"To say that an employee of a railroad company had been discharged 'for failure to ring up all fares collected' does not charge *embezzlement*[9].

"To say that he 'used a company's goods and money for his private use' does not charge *fraud and embezzlement*[10].

"To ask in writing concerning a district attorney charged with the enforcement of the law and referring to the source of the money used in his campaign, 'How about the race track?' does not charge *bribery* and official corruption[11].

"The reason is that in each of these charges an essential element of the offense is lacking."

At page 27 Judge Yankwich states:

"In Grand v. Dreyfus supra the supreme court held that the word 'take' could not by innuendo be construed to mean steal. See also Goldstein v. Foss, 4 Bing. 489, 13 Eng. C. L. Rep. 601, Commonwealth v. Szliakys, 150 N. E. 190."

On page 24 of his work Judge Yankwich adopts the remark of Lord MacNaghten in *Neville v. Fine Art & General Insurance Co.*, L. R. (1897) App. Cas. 68, as follows:

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5. Sweaas v. Evenson, 110 Minn. 304.
6. Mellen v. The Times-Mirror Co., 167 Cal. 587.
7. Vellikanje v. Millichamp, 67 Wash. 138; Stockley v. Clement, 4 Bing. 162, 13 Eng. C. L. Rep. 440.
8. Diener v. Star-Chronicle Pub. Co., 232 Mo. 416.
9. Pittsburg Railway Co. v. McCurdy, 114 Penn. St. Rep. 554.
10. Johnson v. Brown, et al., 13 W. Va. 71.
11. Warner v. Baker, 36 App. D. C. 493.

"'Because some persons may choose, not by reason of the language itself but by reason of some fact to which it refers, to draw an unfavorable inference, it does not follow that therefore such matter is libelous'."

On page 29, Judge Yankwich, referring to "several important principles in the law of libel" says:

"Among them is the principle that in determining whether a publication is libelous the publication must be considered as a whole. The 'bane' and the 'antidote' must be taken together."

On page 78 of the brief reference is had to *Browne v. Prudden-Winslow Co.,* 186 N. Y. Supp. 350, 195 App. Div. 419. There an employer said of a former employee that he had been repeatedly and wilfully dishonest in his transactions. It was held that the charge of dishonesty was nondefamatory because, construed in its context, it meant only the abuse of the relation between employer and employee in attempting to divert business to a rival concern, and it did not impute embezzlement or larceny.

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## III.

### EVIDENCE WAS ERRONEOUSLY ADMITTED CONCERNING EFFORTS OF THE PLAINTIFF TO FIND EMPLOYMENT.

This is the fourth ground upon which appellant submits that the judgment should be reversed.

### A. Assignments of error Involved:

XXVI. (R. 44)

"The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant as follows:

'Mr. Van Dyke: Q. Now, Mr. Gray, after you left Swift & Company's place of business, after this last

conversation, what did you do with regard to seeking employment?

'Mr. Harrison: Now, this, I presume is offered for the purpose of showing a transaction between this witness and other persons with whom he sought employment. We object to that testimony on the ground that it is wholly incompetent, irrelevant and immaterial; it is not shown to have any connection with the alleged slanderous statements until proof is offered by these other persons the statement was made. It is hearsay testimony and has no connection with the slander charged in the complaint.

'The Court: Overruled.

'Mr. Harrison: Exception.

'A. I went to Virden Packing Company and asked for employment. That is the first place I went to.' "

XLVI. (R. 59)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Who was the first meat company you applied to for employment?

'Mr. Harrison: That is objected to, if the Court please, on the ground that it is irrelevant, incompetent and immaterial and has no connection with the slander charged. Now, there is no showing here and no showing has been attempted to be made that any disparaging remarks of any kind or character were made to any other employers. Counsel now is going into the question of what other employers may have done, and that will obviously open a very wide scope of inquiry.

'The Court: Overruled.

'Mr. Harrison: Exception.

'(Witness) I first applied for employment at the Virden Packing Company at its Offices in South San Francisco, and I talked with the Sales Manager, whose name I don't recall.' "

XLVII. (R. 60)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. What was the conversation you had with the sales manager of the Virden Packing Company?

'Mr. Harrison: That is objected to as hearsay, incompetent, irrelevant and immaterial.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) He told me to drop back in a day or two and he then told me that he had nothing for me.' "

XLVIII. (R. 61)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Give us the conversation you had with that man at Cudahy's?

'Mr. Harrison: Same objection, if the Court please, irrelevant, incompetent, immaterial and hearsay.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'A. I told him the experience that I had; that I wanted to stay in the meat business; that I was willing and had an education and quite a foundation in the meat business; that I thought I could do them some good. He was very much interested in it. I dropped back in several days and spoke to him again and he said that he didn't have anything for me.' "

XLIX. (R. 61)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Give the conversation you had with the sales manager of Hormel Packing Company?

'Mr. Harrison: We object upon the same ground.

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'A. I told him about the same as I had told the other concerns, and he asked me to take this application and fill it out and he would talk to me, or I could just talk to the general manager when I came back. I filled out the application and came back and talked to either the sales manager or the general manager, either one of the two. On the first occasion, I don't remember whether it was the sales manager; it was one or the other; I talked to both men. I asked the second man if I should leave my application blank that I had filled out, and he said, "No, I'm afraid we haven't any place for you".' "

L. (R. 62)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. What happened there? Give the conversation you had with those people at Hickman Products Company.

'Mr. Harrison: My objection goes to this conversation, too, if the Court please.

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I told him my experience down the Peninsula, that I had been running a truck similar to the one that they had down there. I came back later and he said that they had nothing for me.' "

LI. (R. 63)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Give the conversation at Zee and Zoe.

'Mr. Harrison: We object to the conversation on the grounds already stated.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) He told me he was considering three men, of whom I was one. He also asked me to come back the following day, and he would give me his answer. I came back the following day, but he said, "I am sorry, Mr. Gray; we have given the job to someone else".' "

LII. (R. 63)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning the plaintiff's endeavors to obtain employment, as follows:

'Q. Did you get employment at either Cudahy Packing Company or Houser Packing Company in Los Angeles?

'Mr. Harrison: Object to that on the ground that it is immaterial, remote and having no connection with the slander complained of.

'The Court: Overruled.

'Mr. Harrison: Exception.

'A. No, sir. I did not get employment after I left San Francisco until June, 1935'."

**B. Discussion.**

The error in each of the above assignments is the same.

In his complaint plaintiff sought special damages for alleged inability to obtain employment in San Francisco or in the County of San Mateo (Par. III of the Complaint, R. 3). The trial court permitted the plaintiff to introduce evidence of efforts to obtain employment, although no evidence was offered to connect his failure to obtain employment with the alleged slander; there was no evidence that any of the remarks complained of were ever made to any of the parties from whom he sought employment, and no evidence was even offered to show that the parties from whom he sought employment had ever heard of the alleged slander.

After leaving the employment of the defendant in October, 1934, the plaintiff sought employment elsewhere from several different companies. The evidence to which we objected has to do with his efforts to obtain employment from Virden Packing Company in South San Francisco (Assignment No. XXVI, R. 44; No. XLVI, R. 59; No. XLVII, R. 60); with the Cudahy Packing Company (Assignment No. XLVIII, R. 61); with Hormel Packing Company (Assignment No. XLIX, R. 61); with Hickman Products Company (Assignment No. L, R. 62); with Zee and Zoe Company (Assignment LI, R. 63) and even with the Cudahy Packing Company and Houser Packing Company in Los Angeles (Assignment LII, R. 63).

With respect to each of these companies the plaintiff was permitted to testify, over repeated objection, that he asked for employment, speaking to the general manager or sales manager; that these parties were first interested, requested him to call again, or asked him to fill out applications, and that when he called again they had nothing for him (R. 114-18).

This was the plaintiff's only evidence as to special damages. We think it obvious that it was error to admit the evidence.

As to efforts to obtain employment from Cudahy Packing Company and Houser Packing Company in Los Angeles (Assignment LII), the error is clear, because the complaint asks special damages only for failure to obtain employment in San Francisco and in San Mateo County. Special damages are recoverable only if pleaded.

> "Thus, a plaintiff may recover for the loss of his employment as the result of defamation by defendant if he alleges the same as special damage in his petition, but not otherwise." (17 *R. C. L.* p. 431, Sec. 190)
>
> "When certain special damages are alleged plaintiff cannot introduce evidence of other special damages not alleged." (37 *Corpus Juris* 61, Sec. 432)

For a broader reason the error of the trial court is clear as to all evidence relative to attempts to obtain employment. There

could be no possible inference of causal connection between the alleged slander and failure to obtain work. The plaintiff did not show or seek to show that any defamatory utterances had ever been made by the defendant or by anyone on its behalf to any of these companies of whom employment was sought, nor even that remarks which had been made to customers of Swift had ever been retailed or repeated so as to reach the ears of these other companies.

In *Newbold v. The J. M. Bradstreet Co.,* 57 Md. 38, 40 Am. Rep. 426, the court said:

> "Where the alleged libel is only actionable in respect to special damages it must appear to be of a character that the special damage alleged may be the natural and proximate, though not the necessary, consequence of the publication. 2 Greenl. Ev., §420; Townsh. Sl. & Libel, §197, and notes to that section. The special damage must be proved as laid, and any substantial variance between the allegation and proof will be fatal. It must also appear to be the natural and immediate consequence of the defendant's wrongful act; and if the special damage is alleged to consist in the refusal of a third person to deal with the plaintiff, or to give him credit, or in the action of any third person in enforcing obligations, evidence is not admissible of the declarations of such third person as to his reason or motive for so acting; the third person himself must be called to prove his motive; for the act without the reason or motive therefor is no evidence against the defendant. *Tilk v. Parsons,* 2 C. & P. 201; *Tunnicliffe v. Moss,* 2 C. & K. 83; *Dixon v. Smith,* 5 H. & N. 450; *Dicken v. Shepherd,* 22 Md. 415; 2 *Stark. on Sl. & Lib.* 57, 58.
>
> "Now in this case the alleged libel not being actionable *per se,* but only in respect to the special damage alleged, it is quite clear, upon the principles we have just stated, that the offers of proof of special damage, contained in the ninth and tenth exceptions, were not admissible, and therefore properly excluded. *There is no evidence whatever to show any connection between the acts of the parties named in those exceptions and the alleged libel, or that they ever saw it, or knew of its existence. Such evidence could fur-*

*nish nothing more than a foundation for a mere conjecture as to the reasons upon which the parties acted.*" (p. 429.)

Harbinson and Gould did not speak to the Virden, Cudahy, Hormel, Hickman, Zee & Zoe or Houser companies, nor were their utterances ever retailed by others to those companies. The error of the trial court is more grievous when it is recalled that even if these utterances had been retailed so as to reach these companies, Swift could not be held responsible. A defendant is not liable for the unauthorized repetition of a slander by those to whom it was uttered.

*Maytag v. Cummins,* 260 Fed. 74, (C. C. A. 8th); *Carpenter v. Ashley,* 148 Cal. 422, 83 Pac. 444; *Turner v. Hearst,* 115 Cal. 394, 47 Pac. 129; *Burt v. Advertisers Newspaper Company,* 154 Mass. 238, 247; 28 N. E. 1, 6 (per Holmes, J.).

*Maytag v. Cummins,* supra, contains a thorough discussion of the subject. The first two headnotes summarize its conclusions:

> "Voluntary and unauthorized repetitions of a slander by third persons, current rumors and reports thereof and damages flowing therefrom, are not regarded by law as the natural or probable consequences of the original utterance of the slander."
>
> "The legal presumption is that a slander will not be repeated, and that its unauthorized repetition and current rumors and reports of it and the damages therefrom are not to be anticipated by the originator, and are not the natural or probable consequences thereof, but the proximate cause of such damages is the illegal intervening repetition or the making by third persons of the current reports and rumors."

The *Maytag* case expressly notes that the rule is fully established in California (260 Fed. at 82).

*Newell on Slander & Libel,* 3rd Ed., Sec. 257, p. 300, states:

> "It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of

> the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person slandered; and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander."

*Turner v. Hearst,* 115 Cal. 394, at 400, refers to this kind of evidence in slander cases as "pernicious". The *Maytag* decision expresses the same view. Indeed, there the trial court after admitting evidence of the type in question struck it out on motion at the end of the trial. The Circuit Court of Appeals nevertheless held that the evil of admitting the evidence had been accomplished and therefore ordered a reversal.

It said:

> "Such matters tend to draw the attention of the jury away from a consideration of the real issues to a contemplation of other questions, and unconsciously to lead them to render their verdict on the real issues in accordance with their views upon false issues. Knickerbocker Trust Co. v. Evans, 188 Fed. 549, 566, 567, 110 C. C. A. 347. Trials of actions for slander and libel are peculiarly susceptible to evil influences from irrelevant and immaterial matters, as are all actions which excite unusual personal feeling or public interest, so that it is peculiarly desirable that such matters should not creep into the evidence in cases of this character." (p. 83.)

The evil of admitting the evidence in the present case is doubly apparent when we note the instructions given by the court to the jury. The court gave the following instruction (R. 182):

> "If you find for the plaintiff you must award him damages. *You must award special damages in such sum as will compensate him for any loss of income from employment if you find from the evidence that he was unable, for any period of time, to obtain employment by reason of the alleged acts of the defendant, as set forth in the complaint.*

> The evidence shows that special damages, if any, have been proved only *to the extent of $750.* In addition to special damages, if any, which you may award, you may, if you find for the plaintiff, award him such general damages as will compensate him for all the detriment proximately caused to him by the acts of the defendant as alleged in the complaint. Special damages may not exceed $750, and general damages may not exceed $50,000."

The jury was thus told that plaintiff was entitled to special damages to compensate him for any loss of income from employment, if it found from the evidence that he was unable for any period of time to obtain employment by reason of the alleged slander of the defendant, and the sum of $750 was placed in the jury's mind as an appropriate figure for special damages. Inasmuch as the verdict of the jury was for $1750, it is a reasonable inference that the jury awarded the exact sum of $750 as special damages. The instruction of the court, in referring to evidence of inability "to obtain employment by reason of the alleged acts of the defendant" necessarily referred to the very evidence to which we objected, because there was no other evidence to which it could apply. As an abstract proposition the instruction is unobjectionable; the harm done by it had its roots in the admission of the evidence.

Unquestionably the error in admitting the evidence prejudiced the defendant with respect to the extent of damages awarded. And we think that the injurious effects of the error were even more extensive. Juries in slander cases are affected by many factors not logically relevant. While there is no logical connection between plaintiff's failure to obtain employment and any utterances which were made concerning him, it is impossible to know to what extent this evidence may have prejudiced the jury against the defendant on the main issue of liability or no liability. See quotation from *Maytag v. Cummins,* supra, page 23.

We submit that the judgment must be reversed because of the admission of this evidence, if for no other reason.